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APPENDIX A

Opinion of the Supreme Court of North Carolina,
rendered June 2, 1982

er the death penalty in the case being reviewed is really excessive to the penalty being imposed in similar cases. For, to reiterate what the Supreme Court said in *Gregg v. Georgia, supra*, if there are certain kinds of murder cases in which our juries are generally not recommending death, then an occasional death sentence imposed in those kinds of cases ought to be set aside by this Court.[9]

We ought not limit ourselves only to cases where the death sentence was imposed and affirmed. To do so means that we only ask whether the case under review is as bad as the other death cases. The legislature intended us not only to make that determination but also to determine whether the case under review is more deserving of the death penalty than similar cases in which life sentences have been imposed. The statute's plain language requires that we make both kinds of comparisons. Of the two, the latter is the more meaningful and is probably constitutionally required.

Further, by using only other death sentence cases affirmed on appeal, the Court severely limits the pool of cases available for comparison. Since the effective date of our capital punishment statute, 7 June 1977, there have been only six such cases. *See State v. Taylor*, 304 N.C. 249, 283 S.E.2d 761 (1981); *State v. Rook, supra*, 304 N.C. 201, 283 S.E.2d 732; *State v. Hutchins, supra*, 303 N.C. 321, 279 S.E.2d 788; *State v. Martin*, 303 N.C. 246, 278 S.E.2d 214, *cert. denied*, — U.S. —, 102 S.Ct. 431, 70 L.Ed.2d 240 (1981); *State v. McDowell*, 301 N.C. 279, 271 S.E.2d 286 (1980), *cert. denied*, 450 U.S. 1025, 101 S.Ct. 1731, 68 L.Ed.2d 220 (1981); *State v. Barfield*, 298 N.C. 306, 259 S.E.2d 510 (1979), *cert. denied*, 448 U.S. 907, 100 S.Ct. 3050, 65 L.Ed.2d 1137 (1980). The statute requires that we compare factually "similar" cases. Similar cases for comparison purposes are simply not present in such a small sampling. The Court should want to expand, rather than restrict, the pool of cases so that truly similar cases will be more quickly available and we can begin to make the comparisons which the statute requires.

The bar is entitled to know upon what basis we are conducting the proportionality review mandated by the statute. Defendant Pinch has expressly and reasonably requested that we provide this knowledge. We should grant the request. We should not continue to keep the manner in which we perform this duty shrouded in mystery.

9. In my dissenting opinion in *State v. Rook, supra*, 304 N.C. at 245–46, 283 S.E.2d at 758–59, I pointed out that rarely do juries in this state impose the death penalty in cases where a defendant was found to have been under the influence of a mental or emotional disturbance or whose capacity to appreciate the criminality of his conduct or to conform his conduct to law was impaired. I suggested that this Court should be slow to affirm death penalties in which either of these mitigating circumstances was found to exist because the penalty might well be excessive to the penalty imposed generally by juries in these kinds of cases.

STATE of North Carolina

v.

Larry Darnell WILLIAMS.

No. 70A81.

Supreme Court of North Carolina.

June 2, 1982.

Defendant was convicted before the Superior Court, Gaston County, Frank W. Snepp, Jr., J., of first-degree murder under the felony-murder rule and was sentenced to death. The defendant appealed. The Supreme Court, Meyer, J., held that: (1) record clearly supported jury's guilty verdict and its finding of the aggravated circumstance upon which sentencing court based its sentence of death, and (2) sentence of death was not excessive or disproportionate to penalty imposed in similar cases, considering both crime and defendant.

No error.

Exum, J., dissented as to sentence and filed an opinion.

1. Homicide ⇐138

Failure of indictment charging defendant with first-degree murder under felony-murder rule to charge defendant with underlying felony of armed robbery had no effect on subsequent murder conviction in view of fact that in a prosecution for first-degree murder under felony-murder rule, solicitor need not secure a separate indictment for underlying felony.

2. Jury ⇐108

Potential jurors expressed sufficient refusal during voir dire to follow law of capital punishment, should it become applicable to case, to justify excusal for cause.

3. Jury ⇐108

Fact that prospective juror's negative responses to questions as to her willingness to impose death penalty were phrased as "I'm not sure I could" or "I'm not positive I could" did not equivocate her refusal to follow law as given by judge to such an extent as to make challenge for cause improper.

4. Jury ⇐142

Trial judge's refusal to allow defense counsel to enter an objection on record to exclusion of prospective juror for cause after defense counsel had indicated he had no questions to ask juror did not impermissibly place burden of "death disqualification" on defense since judge, by indicating in his refusal that it was counsel's duty to try to rehabilitate a juror, was merely admonishing defense counsel of duty of effective representation.

5. Indictment and Information ⇐144.1(2)

Where State and defendant stipulated that compilation of master jury panel lists from which members of grand jury and master panel from which venire of trial jurors had been drawn for trial were selected in accordance with statutory requirements from voter registration lists and property tax lists for county, there was no evidence of any intentional discrimination upon grounds of race in preparing lists, and defendant did not investigate other sources from which information as to racial computation of master jury panel might be determined, trial court properly refused to dismiss indictment and to strike venire of petit jurors on ground that grand and petit venires were discriminatorily selected and failed to represent cross section of community. G.S. § 9–1 et seq.

6. Costs ⇐302.3

Trial court properly denied defendant's motion that court order State to provide funds to hire a statistician to assist defendant in his challenge to array of grand jury and composition of petit jury venire.

7. Costs ⇐302.2(2)

A State-funded expert assistant must be provided an indigent defendant only upon a showing by defendant that there is a reasonable likelihood that it will materially assist defendant in the preparation of his defense or that without such help it is probable that the defendant will not receive a fair trial.

8. Criminal Law ⇐641.10(3)

Defendant could not represent himself and participate as cocounsel in trial and in voir dire and, at same time, accept services of court-appointed counsel.

9. Jury ⇐33(2.1)

Both process of "death qualifying" jury, and excluding for cause those jurors who express opposition to death penalty, prior to guilt phase of trial in capital case and requiring same jury to hear both guilt phase and penalty phase of trial are constitutional. G.S. § 15A–2000(a)(2).

10. Criminal Law ⇐412.1(1), 412.2(1)

Where defendant, when informed of topic which police officer wanted to discuss, chose not to remain silent but emphatically denied his guilt and, when finished with denial, said he wanted to talk to a lawyer, and police officer did not question him further, there was no specific incriminating accusation leveled at defendant at time he

asserted his rights which defendant, by his silence, might be said to have admitted; thus, admission of police officer's testimony during State's case-in-chief as to such conversation did not violate defendant's right to remain silent and his right to counsel. U.S.C.A.Const.Amends. 5, 6, 14.

11. Criminal Law ⇐412.2(5)

Where defendant had been fully advised of his *Miranda* rights and had knowingly and intelligently waived them and voluntarily made statements in which he emphatically denied his guilt, and when finished with denial, said he wanted to talk to a lawyer, such statements were admissible against him at trial.

12. Criminal Law ⇐721(5)

Prosecution is privileged, when appropriate, to argue that State's evidence is uncontradicted, and such arguments may not be held improper as a comment upon defendant's failure to testify.

13. Criminal Law ⇐721(5)

Prosecutor's arguments concerning lack of cross-examination or rebuttal evidence to contradict State's case were not improper comments upon defendant's failure to testify.

14. Criminal Law ⇐730(10, 11)

Ordinarily a prosecutor's reference to failure of defendant to testify or to offer evidence in his defense is cured by trial court's prompt instructions to jury not to consider it.

15. Criminal Law ⇐730(10)

Prosecutor's improper comment on defendant's failure to testify was cured by trial court's instructions to jurors that they would not consider any reference about defendant refuting anything and that defendant's decision not to testify created no presumption against the defendant and was not to influence their decision in any way.

16. Criminal Law ⇐1037.1(1)

Unless improper argument was so prejudicial that no instruction by court could have removed it from minds of jury had an objection been seasonably made, an objection to argument must be made before verdict in order to preserve error.

17. Criminal Law ⇐793

Where fact that alleged accomplices had made arrangements for charge reductions in exchange for their testimony was clearly before jury by way of defense counsel's cross-examination of one of alleged accomplices, defense counsel's argument to jury, and trial court's instructions concerning witnesses' arrangements, and where applicable statute contained no requirement that judge inform jury of any agreement concerning charge reduction or sentence consideration, there was no error despite defendant's contention that trial court failed to instruct jury completely concerning plea bargains of alleged accomplices. G.S. § 15A–1054.

18. Criminal Law ⇐986.2(4)

Use of first of two murders which occurred in separate incidents, separate counties, and were separated in time by approximately three hours as an aggravating circumstance in punishment phase of trial for second murder did not preclude use of second murder as an aggravating circumstance in trial for first murder, nor did it preclude trying defendant for first murder, since defendant was convicted and sentenced only once for first murder and would be punished only once therefor.

19. Criminal Law ⇐986.2(3)

Trial court did not err in excluding evidence offered by defendant regarding lack of any deterrent effect of imposition of death penalty, rehabilitative nature of people who have committed even heinous crimes, and manner of execution in North Carolina in view of fact that such evidence was irrelevant to sentencing of defendant in capital case.

20. Constitutional Law ⇐50.

Just as Legislature acts within its constitutional power in defining first-degree murder to include felony-murder, it is also within its constitutional power to determine that first-degree murder, including felony-murder, may be punished by death, providing that death penalty statute itself is constitutional. G.S. § 15A–2000.

21. Criminal Law ⇐1213

Death penalty imposed upon defendant for murder of a store clerk during armed robbery did not amount to cruel and unusual punishment.

22. Witnesses ⇐414(2)

Trial court did not err in permitting prosecutor on cross-examination of police officer testifying for defendant during sentencing phase of capital case to elicit testimony corroborating prosecution witness' earlier testimony after defendant's attempt to impeach prosecution witness' credibility by questioning police officer only about officer's first interview with prosecution witness, which was inconsistent with prosecution witness' trial testimony, where State's cross-examination elicited contents of police officer's other interviews with prosecution witness which corroborated prosecution witness' testimony.

23. Witnesses ⇐248(2)

Where defendant's contention that State Bureau of Investigation agent's reference to "polygraphist," made while being cross-examined during sentencing phase of capital case about prosecution witness' prior inconsistent statement, was a deliberate attempt to convey to jury impression that statement given by prosecution witness implicating defendant was confirmed by a polygraph examination was based on mere speculation, trial court did not err in overruling defendant's objection to such testimony.

24. Criminal Law ⇐388

Jury could not be deemed to have inferred that a polygraph examination was conducted from a witness' isolated use of the word "polygraphist" where no mention of any polygraph examination was ever made, and where, throughout the rest of the witness' testimony, polygraph examiner was referred to by his name and not by term "polygraphist."

25. Homicide ⇐351

Section of death penalty statute establishing as an aggravating circumstance that murder for which defendant stood convicted was part of a course of conduct is not unconstitutionally vague or without definition. G.S. § 15A-2000(e)(11).

26. Homicide ⇐354

Defendant's robbery and murder of store clerk was clearly within meaning of "course of conduct" aggravating circumstance of capital punishment statute where, within a few hours of such murder, defendant committed another store robbery and murdered the clerk. G.S. § 15A-2000(e)(11).

27. Homicide ⇐311

Fact that defendant's accomplices received a lesser sentence for murder of store clerk was not an extenuating circumstance warranting submission to jury as a specified mitigating circumstance fact that accomplices received a plea bargain whereby maximum punishment for their involvement would be limited to ten years in prison, since such fact did not reduce moral culpability of killing or make it less deserving of penalty of death than other first-degree murders.

28. Criminal Law ⇐986.2(1)

Accomplices' lesser punishment as result of plea bargain is not an aspect of defendant's character or record nor a mitigating circumstance of particular offense.

29. Criminal Law ⇐796

Where fact of accomplices' plea bargain was before jury, and, had jury deemed it a mitigating circumstance, it could have been so considered under mitigating circumstances section of capital punishment statute permitting consideration of "any other circumstance" arising from evidence which jury deems to have a mitigating value, trial court did not err in refusing to submit to jury as a specified mitigating circumstance fact that two accomplices received plea bargain whereby maximum punishment for their involvement would be limited to ten years in prison. G.S. § 15A-2000(f)(9).

30. Criminal Law ⇐796

Where there was no expert psychiatric or other evidence introduced to show that defendant's capacity to appreciate criminal-

ity of his conduct was impaired by alcohol, trial court did not err in refusing to submit to jury defendant's use of alcohol on night of crime as a mitigating circumstance under capital punishment statute. G.S. § 15A-2000(f)(6).

31. Criminal Law ⇐796

Where there was no contention that defendant was intoxicated or that his capacity to appreciate criminality of his conduct or to conform his conduct to requirements of law was impaired, defendant was not entitled to have submitted for jury's consideration as a general mitigating circumstance under capital punishment statute fact that he drank some alcohol on evening of crime. G.S. § 15A-2000(f).

32. Criminal Law ⇐1208(1)

Placing burden on defendant to prove mitigating circumstances under capital punishment statute by a preponderance of evidence and failing to require State to prove absence of existence of mitigating circumstances beyond a reasonable doubt is not error. G.S. § 15A-2000(f).

33. Criminal Law ⇐1206(1)

Death penalty is constitutional. G.S. § 15A-2000.

34. Criminal Law ⇐796

Instruction to jury that if they found beyond a reasonable doubt that aggravating circumstance under capital punishment statute existed, that it was substantially sufficient to call for imposition of death penalty, and that it outweighed any mitigating circumstance or circumstances found, then it would be their duty to recommend that defendant be sentenced to death was proper in that jury had no final option to recommend life imprisonment notwithstanding findings made pursuant to capital punishment statute. G.S. § 15A-2000(c, e, f).

35. Criminal Law ⇐1206(2)
Homicide ⇐354

Imposition of death penalty upon defendant, who deliberately sought out not one, but two lone employees of business establishments in relatively isolated areas during early morning hours when no one was around, robbed them at gunpoint, and then shot them to death at very close range with a shotgun before fleeing with money was not excessive or disproportionate to penalty imposed in similar cases, considering both crime and defendant. G.S. § 15A-2000(d)(2).

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[1] On appeal by defendant as a matter of right from the judgment of Snepp, Judge, entered at the 18 May 1980 Criminal Session of Superior Court, Gaston County. The defendant was charged in an indictment, proper in form, with the murder of Eric Joines. Defendant pled not guilty, and trial began on 2 June 1980. The jury found the defendant guilty of first-degree murder under the felony murder rule and recommended the sentence of death.[1] From the conviction of murder and the judgment of death imposed thereon, the defendant appealed.

Rufus L. Edmisten, Atty. Gen. by Thomas F. Moffitt and Elizabeth C. Bunting, Asst. Attys. Gen., Raleigh, for the State.

Adam Stein, Appellate Defender, Ann B. Peterson and James R. Glover, Asst. Appellate Defenders, Raleigh, for defendant-appellant.

MEYER, Justice.

This appeal presents forty-seven assignments of error for our review. No mean-

1. The defendant was also found guilty of armed robbery but the judgment of conviction on that charge was arrested. Although not brought forward in the defendant's brief, we note that the indictment purportedly charging him with armed robbery failed to so do because it did not identify the defendant; instead it named Linda Massey as the person charged with armed robbery. *State v. Hammonds*, 241 N.C. 226, 85 S.E.2d 133 (1954); *State v. Finch*, 218 N.C. 511, 11 S.E.2d 547 (1940); *State v. McCollum*, 181 N.C. 584, 107 S.E. 309 (1921); *State v. Phelps*, 65 N.C. 450 (1871). This failure has no effect on the murder conviction, however, because when the State prosecutes a defendant for first-degree murder under the felony-murder rule, the solicitor need not secure a separate indictment for the underlying felony. *State v. Carey*, 288 N.C. 254, 218 S.E.2d 387 (1975).

ingful summary statement of the numerous issues presented by these assignments is possible. We have grouped the assignments essentially as they are in the defendant's brief. Our conclusion is that there was no error in the proceedings below, and the judgment and sentence of death is affirmed.

The evidence at trial showed that during the dark hours of 2–3 June 1979, Eric Joines was working the third shift at Station Number 5 of Service Distributors on Highway 321 North in Gastonia. His duties were selling gas and oil and collecting money. Sidney Sivvoy Kirksey testified that he had seen Mr. Joines after dark at Service Distributors on 2 June, and had telephoned him at the station later from Belmont and heard voices in the background. Herbert William Frye testified that sometime during the early morning hours of 3 June he and Mack Wright stopped at the station to get some gas and found Mr. Joines lying on his stomach in a puddle of blood with part of the back of his head blown away. The police were summoned to the scene and when Officer Wilson of the Gastonia City Police arrived a few minutes later, at about 4:18 a. m., Mr. Joines was still alive, coughing and gagging. Dr. Sivalingam Siva, an expert in neurosurgery, saw Mr. Joines in the emergency room at Gastonia Memorial Hospital. He testified that in his opinion, the wound in the right side of Mr. Joines' neck was caused by a shotgun blast, possibly from a very close range and that the victim died from lack of oxygen to the brain caused by the gunshot wound.

The testimony of two accomplices, cousins of each other, Linda Massey and Darryl Brawley, established that on the evening of 2 June the defendant, the two witnesses, and another male, not positively identified, were together in Charlotte traveling in a car belonging to Robert Brown, another cousin of Linda Massey. The defendant and Brown had traded cars earlier in the day. The defendant had a 20-gauge sawed-off shotgun with him in the car.

During the course of the evening, the group was drinking alcohol, smoking marijuana, and taking Valium. They traveled onto Interstate 85 and left Charlotte. They later got off the interstate at an exit and passed the service station where Eric Joines worked. They came back up the road to the station and stopped there, apparently "casing" the service station. They then traveled down the road in the opposite direction and once again returned to the service station. The unidentified fourth person and the defendant, with shotgun in hand, went into the booth where Mr. Joines worked and robbed him. The defendant then shot him and they got back into the car with the money from the cash register they had put in a bag.

The defendant chose not to present any evidence during the guilt-innocence phase of the trial. The jury returned a verdict of guilty of first-degree murder under the felony murder rule.

At the sentencing phase, the State presented evidence of only one aggravating circumstance, that the murder of Eric Joines was part of a course of conduct in which the defendant engaged and which included the commission by the defendant of other crimes of violence against another person or persons. G.S. § 15A–2000(e)(11). The evidence showed that after the Joines killing in Gastonia, the defendant and the other three occupants of the car proceeded to Concord and there stopped at a Seven-Eleven convenience store. The defendant and the unidentified male entered the store and the defendant returned to the car, got his shotgun and went back into the store where he fatally shot the clerk, Mrs. Susan Verle Pierce. The two then robbed the store of $67.00 in cash.[2]

The defendant presented evidence that he had cooperated with his attorney in a personal injury action, had voluntarily admitted himself to a drug treatment center, had been gainfully employed and was a good

2. For further details of this robbery-murder, see *State v. Williams*, 304 N.C. 394, 284 S.E.2d 437 (1981)—hereinafter "Williams (I)."

worker, had financially assisted his family members and was a loving family member. He also presented evidence tending to impeach the testimony of Darryl Brawley.

The judge submitted, and the jury found, the existence of the one aggravating circumstance. The judge submitted ten mitigating circumstances and the jury found the existence of seven of them:

A. The defendant has no significant history of prior criminal activity.
Answer: Yes

B. The defendant's age at the time of this murder (24 years).
Answer: Yes

C. The defendant was gainfully employed at the time of the murder for which he has been convicted, was a good worker, and had been gainfully employed since he was a teenager.
Answer: Yes

D. The defendant demonstrated a determination to overcome his problems and to try to lead a better life by voluntarily submitting himself for treatment for drug problems in October, 1975 and January and February, 1976.
Answer: Yes

E. Defendant's IQ of 69 is a mitigating circumstance.
Answer: No

F. Defendant's conduct in a normal business manner with Attorney Karl Adkins as to a personal injury case is a mitigating circumstance.
Answer: No

G. The defendant has a good character and reputation.
Answer: Yes

H. The defendant is considerate and loving to his mother and sisters.
Answer: Yes

I. The defendant is a considerate and loving father.
Answer: Yes

J. Any other circumstance or circumstances arising from the evidence which you deem to have mitigating value.
Answer: No

The jury found beyond a reasonable doubt that the aggravating circumstance outweighed the mitigating circumstances and recommended that the defendant be sentenced to death. Judgment was entered pursuant to this recommendation.

I. PRETRIAL MOTIONS AND JURY SELECTION

The defendant assigns as error (Assignments Nos. 21 and 22) the trial court's excusal for cause of the three veniremen, Robertson, Melton, and Williams. The defendant argues that these three potential jurors were improperly excused for cause and thus the defendant was deprived of his life without due process of law and his right to trial by jury.

[2] This argument concerns the trial court's excusal for cause during *voir dire* of the three veniremen because of their responses to the *Witherspoon v. Illinois*[3] "death qualification" questions.

> The applicable constitutional standard permits the excuse of a potential juror for cause if it is established that he 'would *automatically* vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case . . . .' *Witherspoon v. Illinois*, 391 U.S. 510, 522 at n. 21, 88 S.Ct. 1770, 1777 [at n. 21], 20 L.Ed.2d 776, 785 [at n. 21] (1968); *see State v. Cherry*, 298 N.C. 86, 257 S.E.2d 551 (1979), *cert. denied*, 446 U.S. 941, 100 S.Ct. 2165, 64 L.Ed.2d 796 (1980).

State v. Pinch, — N.C. —, 292 S.E.2d 203 (1982). The defendant contends that the three jurors excused for cause on this basis did not unequivocally state that they were so unalterably opposed to the death penalty that they would be unwilling to vote in favor of the death sentence no matter how aggravated the facts and circumstances turned out to be. The record reveals that this contention is without merit, for considering contextually their responses to the questions propounded, the potential

3. 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968).

jurors expressed sufficient refusal to follow the law of capital punishment, should it become applicable to the case, to justify their excusal for cause. *State v. Pinch*, —— N.C. ——, 292 S.E.2d 203; *State v. Avery*, 299 N.C. 126, 261 S.E.2d 803 (1980).

The record reveals that Frances Williams unequivocally stated that she would not impose the death penalty:

EXAMINATION By the Court:

....

Q. All right. Now, if you answered each of those yes—that you found beyond a reasonable doubt there were aggravating circumstances, you found beyond a reasonable doubt that they were sufficiently substantial to call for the imposition of the death penalty, and you also found that the aggravating circumstances beyond a reasonable doubt outweighed the mitigating circumstances, would you then vote to impose the death penalty?

A. I just don't feel like I could impose the death penalty.

Q. Not even if you were satisfied beyond a reasonable doubt of those things?

A. No I feel life imprisonment.

MR. CLONINGER: Could I ask her one more question?

COURT: (Nods his head.)

EXAMINATION By Mr. Cloninger:

Q. Mrs. Williams, you understand that unless you were convinced beyond a reasonable doubt that the aggravating circumstances were sufficiently substantial to require the death penalty you would not be required to recommend a sentence of death?

A. Um-hum.

Q. All right. Knowing that, again I ask you could you not follow the law that His Honor gives you and apply it and make your own determination based on the law His Honor gives you and the evidence that you'll hear at the sentencing hearing?

A. Well, I understand that, you know, I have to take the evidence into consideration, and I realize that the law with the death penalty—I understand that that is one of the penalties, but I just don't feel the death penalty is right. That's just—

Q. Yes, ma'am. I understand that. I understand your feelings. Do you understand that you would not be required under the law to make a recommendation of the sentence of death unless you yourself were personally satisfied beyond a reasonable doubt that the aggravating circumstances that the State alleged were sufficiently substantial to justify in your mind a recommendation of a death sentence? Do you understand that?

A. Right. I have to feel that it's—that—that the evidence is all there and that in my mind I feel like that that's—that's what you are trying to tell me, right?

Q. What I'm trying to tell you, I guess, is you understand that you are not required to make a recommendation of a sentence of death unless you are satisfied beyond a reasonable doubt that the aggravating circumstances are so bad—are so substantially—are so sufficiently substantial to require in your mind the imposition of the death sentence? If you are not convinced beyond a reasonable doubt of that in your mind, you are not required to make a recommendation of death. Now, again I ask you could you not do that?

A. I could in my mind think and decide, yes, how I felt.

COURT: Well, Mrs. Williams, if you were satisfied of all those things beyond a reasonable doubt, then would you invoke to impose the death penalty?

A. I just don't feel like that I could.

The same is true of Mrs. Robertson:

EXAMINATION By the Court:

....

Q. If you serve as a juror in this case, could and would you if called upon to do so make a sentence recommendation of life imprisonment or death in accordance with the law of North Carolina as that will be explained to you by the court, or would you be unable to do so regardless of the law and the facts and circumstances and evidence because of your conscientious beliefs as to the proper punishment for first-degree murder?

A. I believe I would be unable to.

Q. You feel that in spite—you could not follow the law—that if—even though the State has satisfied you beyond a reasonable doubt of the things it is required to so satisfy you under the law that you could not return a recommendation of punishment of death because of your beliefs about that?

A. I believe I could not.

. . . .

EXAMINATION By Mr. Cloninger:

Q. Do you feel if you were selected as a juror that you could consider the death penalty if it became necessary to consider it, that you could discuss it with other jurors, that you could discuss the law, and you could discuss the evidence in the case? You could consider it, couldn't you?

A. I could discuss the evidence, yes. I'm not too sure about discussing the death penalty.

Q. Well, you could discuss it with other jurors, couldn't you?

DISTRICT ATTORNEY: OBJECTION to arguing with the witness.

COURT: Go ahead.

Q. Do you feel like you could discuss it?

A. I'm not sure.

Q. All right, and I ask you—there are some circumstances—some aggravating circumstances which are so serious, so severe that you could consider the death penalty as an appropriate sentence and consider recommending it, couldn't you?

A. No.

Q. Under no circumstances?

A. I don't believe so.

[3] The record concerning Mrs. Melton consists of the following questions by the Court and her answers thereto:

EXAMINATION By the Court:

. . . .

Q. Now, if you serve as a juror in this case, could and would you if called upon to do so make a sentence recommendation of life imprisonment or death in accordance with the law as it will be explained to you by the court, or would you be unable to do so regardless of the law and the facts and circumstances revealed by the evidence because of some conscientious belief as to the proper punishment for first-degree murder; that is, that you conscientiously feel that it should in all cases be life in prison or you feel in all cases it should be the death penalty?

A. Your Honor, I'm not sure I could say that someone else had to die. I'm not sure I could do that.

Q. Well, it's—this is something we have to determine at this state—whether you if you serve as a juror could follow the law of North Carolina and if you are satisfied beyond a reasonable doubt of those things which the law requires you to be satisfied you could then return a recommendation of the death penalty.

A. I'm not positive I could do that. I've never been called on to do that, and I'm not sure that I could live with my conscience.

Q. Well, do you have conscientious beliefs about the death penalty—religious beliefs about it?

A. Yes.

Q. And you do not feel that you could follow the instructions of the court if you were satisfied beyond a reasonable doubt of the things of which you must be satisfied. If those conclusions would call for the death penalty, you don't feel you could make such a recommendation?

A. I'm not sure that I could.

The fact that her negative responses were phrased as "I'm not sure I could" or "I'm not positive I could" does not equivocate her refusal to follow the law as given by the judge to such an extent as to make the challenge for cause improper. *State v. Avery*, 299 N.C. 126, 261 S.E.2d 803. It is apparent that Mrs. Melton was "irrevocably committed before the trial [began], to vote against the penalty of death regardless of the facts and circumstances that might emerge in the course of the proceedings." *Davis v. Georgia*, 429 U.S. 122, 97 S.Ct. 399, 50 L.Ed.2d 339 (1976).

[4] The defendant argues in connection with his Assignments 21 and 22 that the

judge suggested that the defendant was obligated to examine the potential jurors about their death penalty feelings. This contention presents a misinterpretation of the judge's remarks. The exchange upon which the contention is based is as follows:

[By the Court:]

Q. Do you wish to ask her any questions?

DISTRICT ATTORNEY: The State would challenge her for cause.

MR. CLONINGER: We don't—I don't wish to ask her any questions, Your Honor.

COURT: All right. The challenge for cause is allowed. Thank you, Mrs. Melton. I'm going to ask you to go up to Courtroom B. Judge Kirby will know whether he needs you for any other case. Okay. Thank you.

MR. CLONINGER: Could we for the record enter an objection to the exclusion of that juror, Mrs. Melton?

COURT: Now, gentlemen, I'm not going to—if you want to try to rehabilitate a juror, you're going to do it. I'm not going to play games. Now, I gave you an opportunity to ask any questions you wanted to ask. What's the next juror's name?

There is no indication that the judge was placing the burden of "death disqualification" on the defense. The judge was merely admonishing defense counsel of his duty of effective representation. By further questioning, the defense possibly could have shown that the potential juror did not actually mean to say that he or she could not return a recommendation of death no matter what the circumstances.

The defendant was not denied his constitutional rights to due process of law or trial by jury by the excusal of these jurors for cause. *State v. Pinch*, —— N.C. ——, 292 S.E.2d 203; *State v. Avery*, 299 N.C. 126, 261 S.E.2d 803; *State v. Cherry*, 298 N.C. 86, 257 S.E.2d 551 (1979), *cert. denied*, 446 U.S. 941, 100 S.Ct. 2165, 64 L.Ed.2d 796 (1980). Assignments of Error Nos. 21 and 22 are overruled.

The defendant assigns as error (Assignments Nos. 1, 2 and 3) the trial court's failure to dismiss the indictment and to strike the venire of petty jurors on the ground that the grand and petty venires were discriminatorily selected and failed to represent a cross-section of the community. He further assigns as error the trial court's denial of defendant's motion that the court order the State of North Carolina to provide funds to hire a statistician to assist the defendant in his challenge to the array of the grand jury and the composition of the petty jury venire.

[5] In ruling on these motions, the court found that it had been stipulated between the State and the defendant that the compilation of the master jury panel list for Gaston County, from which the members of the grand jury returning the indictments in this case were drawn, and the master panel, from which the venire of the trial jurors had been drawn for the trial in this case, were selected in accordance with the provisions of Chapter 9 of the General Statutes of North Carolina, i.e. from the voter registration lists and the property tax lists for the county. The State and the defendant also stipulated that there was no evidence of any intentional discrimination upon the grounds of race in preparing these lists. The court concluded therefore as a matter of law that the procedure followed was in conformity with the Constitution of the United States and the Constitution of North Carolina. Defendant's counsel did not investigate other sources from which information as to the racial computation of the master jury panel might be determined. Based on these factors, the judge properly denied the defendant's motions to dismiss the indictment. *State v. Cornell*, 281 N.C. 20, 187 S.E.2d 768 (1972).

[6, 7] The trial court also properly denied the defendant's motion for a State-funded statistician. Our cases have established the rule that an expert assistant, in this case a statistician, must be provided "only upon a showing by the defendant that there is a reasonable likelihood that it will materially assist the defendant in the prep-

aration of his defense or that without such help it is probable that the defendant will not receive a fair trial." *State v. Gray*, 292 N.C. 270, 279, 233 S.E.2d 905, 911 (1977); *State v. Tatum*, 291 N.C. 73, 229 S.E.2d 562 (1976).

The defendant also argued that it was error for the trial court to deny his motion for a court-appointed expert to aid him in his challenge to the jury compositions in his appeal to this Court of his Cabarrus County murder conviction. *State v. Williams* (I), 304 N.C. 394, 284 S.E.2d 437 (1981). There, this Court pointed out that the defendant had made no showing of a reasonable likelihood that the appointment of a statistician would have materially assisted him in the preparation or presentation of his contentions and thus overruled the assignment of error. The defendant concedes that he made no stronger showing of a reasonable likelihood that a statistician would be of material assistance in this case than he did in the Cabarrus County case, but asks the court to reconsider its rulings on this issue. We reaffirm our prior rulings, and Assignments of Error Nos. 1, 2 and 3 are overruled.

[8] In Assignment of Error No. 15, the defendant contends that the court erred in denying his motions to allow him to participate as co-counsel in the trial and to participate in *voir dire*. This same argument also was rejected in *Williams* (I). We reaffirm our ruling there:

> Although a criminal defendant cannot be required to accept the services of court-appointed counsel, (citations omitted) we have previously said that a criminal defendant cannot represent himself and, at the same time, accept the services of court-appointed counsel. *State v. House*, 295 N.C. 189, 244 S.E.2d 654 (1978), answered this very question as follows:
>
> > It is well settled that a defendant in a criminal action has a right to represent himself at the trial and cannot be required to accept the services of court-appointed counsel. (Citations omitted.) It is, however, equally well settled that '[a] party has the right to appear *in propria persona* or by counsel, but this right is alternative,' so that 'one has no right to appear both by himself and by counsel.' (Citations omitted.) Thus, while the defendant elected to retain the services of the court-appointed counsel, the court did not err in holding that the interrogation of prospective jurors and of witnesses must be done through his counsel.
>
> *Id.* at 204, 244 S.E.2d at 662.
>
> The Court's decision in *House* clearly answers the question posed by this assignment of error adversely to defendant's contention.

Williams (I) at 407, 284 S.E.2d at 446.

This assignment of error is overruled.

[9] The defendant next argues that (Assignments of Error Nos. 7, 16, 17, 18, 19, 20, and 41):

> [T]he procedure set out in G.S. § 15A-2000(a)(2) for death qualifying a jury prior to the guilt phase and requiring the same jury to hear both the guilt phase of the trial and the penalty phase of the trial is unconstitutional. It is the defendant's contention that "death qualifying" the jury prior to the guilt phase results in a guilt prone jury; thereby depriving the defendant of his right to a fair trial, a fair sentencing hearing and freedom from cruel and unusual punishment, all guaranteed by the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. In addition, the defendant contends that the process of 'death qualifying' the jury and excluding for cause those jurors who express opposition to the death penalty deprives the defendant of his rights to equal protection of the laws, a jury chosen from a cross-section of the community and due process of law, all guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution.

As acknowledged by the defendant, this Court has decided these issues against the defendant, and the assignments of error

upon which this argument is made are without merit. *State v. Pinch*, — N.C. —, 292 S.E.2d 203; *State v. Taylor*, 304 N.C. 249, 283 S.E.2d 761 (1981); *State v. Avery*, 299 N.C. 126, 261 S.E.2d 803.

II. GUILT–INNOCENCE PHASE

Under Assignments of Error Nos. 33 and 34, the defendant argues that the admission of Officer Rivelle's testimony to the effect that defendant chose to exercise his right to remain silent and waived his right to counsel deprived the defendant of his right to remain silent, his right to counsel, and his right to due process of law.

Officer Rivelle testified in pertinent part as follows:

DIRECT EXAMINATION By District Attorney:

I know the defendant, Larry Darnell Williams. I talked to him on or about June 11, 1979. I advised him of his rights as to self-incrimination. His rights were advised to him—his constitutional rights. He appeared to understand those rights. After I read him his rights, I told him I wanted to talk to him about a robbery and a shooting that happened in Gastonia on June 3, 1979, in the early morning hours.

Q. Now, what, if anything, did Mr. Williams say to you when you made that statement to him?

MR. CLONINGER: OBJECTION.

COURT: OBJECTION OVERRULED.

He stated that he didn't know anything about any robbery or homicide. That he didn't do capital crimes. When I asked him whether he was in Gastonia the 3rd of June, in the early morning hours, he told me that he'd been in Charlotte at that time with Linda Massey and a fourteen year old boy and they were smoking reefers and drinking wine.

Q. And what else was said—did you say to him or did he say to you after that?

A. He said he didn't rob or kill anybody and that he wanted to talk to a lawyer.

Q. And what, if anything did you do when he requested the presence of a lawyer?

A. There was no more questioning.

Defendant contends that the admission of the answers to the last two questions violated his right to remain silent and his right to counsel, citing the rules of *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), and *Doyle v. Ohio*, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976).

Doyle concerns the use of defendant's silence after *Miranda* warnings for impeachment purposes. The testimony given here was during the State's case-in-chief. Thus, the thrust of the defendant's argument is based on a paragraph from footnote number 37 of the *Miranda* opinion:

> In accord with our decision today, it is impermissible to penalize an individual for exercising his Fifth Amendment privilege when he is under police custodial interrogation. The prosecutor may not, therefore, use at trial the fact that he stood mute or claimed his privilege in the face of accusation.

[10] This Court has often recognized that it is impermissible to use the accused's silence in the face of an accusation to imply guilt. *See State v. McCall*, 286 N.C. 472, 212 S.E.2d 132 (1975); *State v. Caster*, 285 N.C. 286, 204 S.E.2d 848 (1974). However, that rule does not apply here. When informed of the topic which the police officer wanted to discuss, the defendant chose not to remain silent. He emphatically denied his guilt, and when finished with his denial, said he wanted to talk to a lawyer; thus the officer, as required by *Miranda*, did not question him further. There was no specific incriminating accusation leveled at the defendant at the time he asserted his rights which defendant, by his silence, might be said to have admitted. *See State v. Love*, 296 N.C. 194, 250 S.E.2d 220 (1978). Compare *State v. McCall*, 286 N.C. 472, 212 S.E.2d 132, wherein, after the officer advised the defendant that he had a warrant for his arrest for the killing of Mr. and Mrs. Hice and asked him why he killed them, defendant immediately asserted his right to remain silent.

[11] It is apparent from the reading of this testimony that the State did not use the defendant's request for an attorney to infer guilt. The trial court conducted a *voir dire* hearing and concluded that the defendant had been fully advised of his *Miranda* rights and had knowingly and intelligently waived them and voluntarily made the statements to which the officer testified. Thus, they were admissible against him at trial. These assignments of error are overruled.

In Assignments of Error Nos. 36 and 49, defendant argues that he was prejudiced by the prosecutor's improper comments on his failure to testify or offer evidence to contradict the State's evidence; that the court's instructions did not cure the error; and that the court erred further in denying defendant's motion for appropriate relief on this basis.

[12, 13] The prosecution is privileged, when appropriate, to argue that the State's evidence is uncontradicted, and such argument may not be held improper as a comment upon the defendant's failure to testify. *State v. Smith*, 290 N.C. 148, 226 S.E.2d 10, *cert. denied*, 429 U.S. 932, 97 S.Ct. 339, 50 L.Ed.2d 301 (1976). Any contradictions existing could have been shown by the testimony of others or by cross-examination of the State's witnesses themselves. Thus the prosecutor's arguments concerning lack of cross-examination or rebuttal evidence to contradict the State's case are not improper.

When the prosecutor argued that the jury had "neither heard by cross-examination or direct evidence on behalf of Mr. Williams that he was not there," the court immediately sustained defense counsel's objection and instructed the jurors that they would "not consider any reference about Mr. Williams refuting anything." The court later instructed the jury that defendant's decision not to testify created no presumption against him and was not to influence their decision in any way.

[14, 15] Ordinarily a prosecutor's reference to the failure of the defendant to testify or to offer evidence in his defense is cured by the trial court's promptly instructing the jury not to consider it. *State v. Sparrow*, 276 N.C. 499, 173 S.E.2d 897 (1970); *State v. Lindsay*, 278 N.C. 293, 179 S.E.2d 364 (1971). The defendant's Memorandum of Additional Authority cites *State v. Britt*, 288 N.C. 699, 220 S.E.2d 283 (1975), for the premise that a curative instruction by the judge does not always cure highly improper statements made by a prosecutor during closing arguments or improper cross-examination by a prosecutor. While we agree with this premise, we point out that the improper comment in this case does not compare with the highly improper cross-examination and comments by the prosecutor in *Britt*. The court's instructions in this case cured any error in the prosecutor's comments.

[16] Further, defense counsel did not object at trial to all of the comments which are assigned as error. Unless the improper argument was so prejudicial that no instruction by the court could have removed it from the minds of the jury had an objection been seasonably made, an objection to the argument must be made before the verdict in order to preserve the error. *State v. Coffey*, 289 N.C. 431, 222 S.E.2d 217 (1976).

Assignments of Error Nos. 36 and 49 are overruled.

[17] The defendant assigns as error (Assignments Nos. 25, 37, 38, 68, and 69) the trial court's failure to instruct the jury completely concerning the plea bargains of Linda Massey and Darryl Brawley. The defendant contends that since these witnesses' plea agreements provided that their ten-year sentences for accessory after the fact to the murder of Eric Joines would run concurrently with the ten-year sentences for accessory after the fact to the Concord murder, their effect was to provide a grant of immunity in this case and thus the judge should have informed the jury of their im-

munity pursuant to G.S. § 15A–1052.[4] This contention is without merit.

Neither Linda Massey nor Darryl Brawley were granted immunity in this case. Their agreement was to plead guilty to accessory after the fact to the murder of Eric Joines for a sentence of ten years to run concurrently with their sentences in the Concord murder.

The applicable statute here is G.S. § 15A–1054:

> *Charge reductions or sentence concessions in consideration of truthful testimony.*—(a) Whether or not a grant of immunity is conferred under this Article, a prosecutor, when the interest of justice requires, may exercise his discretion not to try any suspect for offenses believed to have been committed within the judicial district, to agree to charge reductions, or to agree to recommend sentence concessions, upon the understanding or agreement that the suspect will provide truthful testimony in one or more criminal proceedings.
>
> (b) Recommendations as to sentence concessions must be made to the trial judge by the prosecutor in accordance with the provisions of Article 58 of this Chapter, Procedure Relating to Guilty Pleas in Superior Court.
>
> (c) When a prosecutor enters into any arrangement authorized by this section, written notice fully disclosing the terms of the arrangement must be provided to defense counsel, or to the defendant if not represented by counsel, against whom such testimony is to be offered, a reasonable time prior to any proceeding in which the person with whom the arrangement is made is expected to testify. Upon motion of the defendant or his counsel on grounds of surprise or for other good cause or when the interests of justice require, the Court must grant a recess.

This statute, unlike G.S. § 15A–1052, contains no requirement that the judge inform the jury of any agreement concerning charge reduction or sentence consideration.

The defense had the right and the opportunity both to cross-examine the witnesses about their arrangements and to argue to the jury with respect to the impact of the arrangements upon their credibility. *See* G.S. § 15A–1055. Indeed Mr. Brawley was cross-examined concerning his arrangement (Record at 124), and defense counsel in his argument to the jury repeatedly reminded the jury of both the witnesses' bargains:

> [T]he two individuals that have accused the defendant in this case, as I argued and contended to you before, are the two most interested people in the outcome of this case, next to the defendant over here. The two people who have gained the most from this trial.
>
> . . . We told you that the heart of this case rested in the testimony of the accomplices, and throughout this trial, I consider it to be one of the most amazing things I've ever seen that we have not heard or seen, to my way of thinking, one shred of evidence—not one shred of evidence that supports or lends credibility to these two people—the two people I've told you under the law fall in the catego-

4. § 15A–1052. *Grant of immunity in court proceedings.*—(a) When the testimony or other information is to be presented to a court of the trial division of the General Court of Justice, the order to the witness to testify or produce other information must be issued by a superior court judge, upon application of the district attorney:

(1) Be in writing and filed with the permanent records of the case; or

(2) If orally made in open court, recorded and transcribed and made a part of the permanent records of the case.

(b) The application may be made whenever, in the judgment of the district attorney, the witness has asserted or is likely to assert his privilege against self-incrimination and his testimony or other information is or will be necessary to the public interest. Before making application to the judge, the district attorney must inform the Attorney General, or a deputy or assistant attorney general designated by him, of the circumstances and his intent to make an application.

(c) In a jury trial the judge must inform the jury of the grant of immunity and the order to testify prior to the testimony of the witness under the grant of immunity. During the charge to the jury, the judge must instruct the jury as in the case of interested witnesses.

ry of the most untrustworthy kind of witnesses you can offer, and that is what is known as accomplices—an accomplice's testimony, and I will go into that later.

....

... [Linda Massey and Darryl Brawley] are currently charged with armed robbery and murder although they are going to be permitted to plead to something much less.

....

... [T]he more severe the penalty, the more likely, I argue and contend to you, that accomplice testimony is liable to be false.

It is human nature of the basest form for people to try to shun responsibility for criminal and immoral acts on other people. It is a natural tendency in all of us, and how much more natural and how much more probable when the false testimony or the testimony which we argue and contend to you is false is given by people who face a possible death sentence or possibly two life sentences and who in exchange for their testimony are able to receive a maximum sentence of ten years and I argue and contend to you that in at least one case, the possibility of release much sooner than that—much sooner.

....

Mrs. Massey has gotten the best of both worlds, ladies and gentlemen. She got her deal from the State on the one hand, and she didn't have to directly accuse anybody of anything. The difference between Brawley and Massey, I think, is that Brawley really enjoys what he's doing up there, and Mrs. Massey doesn't. The one thing that they have in common is that both of them were facing death or two life sentences, and now, they are facing a maximum of ten years. Her testimony is preposterous—absolutely preposterous.

....

... [Darryl Brawley] has been given the deal of a lifetime, as I've pointed out to you.

In addition, the State entered into evidence the following stipulation:

That Linda Massey was charged in Gaston County with murder in the first degree and armed robbery and that the State of North Carolina agreed with Linda Massey that in exchange for her truthful testimony that the State would allow her to plead guilty to accessory after the fact of murder and that she receive a sentence of ten years and that this sentence would run concurrent with any other sentence that she might now be serving.

During closing arguments, the State too reminded the jury of the agreements made with Massey and Brawley. Moreover, during the guilt determination phase, the judge instructed the jury that:

Each of these witnesses has testified under an agreement with the prosecutor for a charge reduction in exchange for that witness' testimony. I instruct you that if you find that either of these witnesses testified in whole or in part for this reason it is your duty to scrutinize that witness' testimony with great care and caution in deciding whether or not to believe him. If after doing so you believe the testimony in whole or in part, you should then treat what you believe the same as any other believable evidence.

And there is evidence which tends to show that these witnesses may have been accomplices in the commission of the crimes charged in these cases. An accomplice may actually take part in acts necessary to accomplish a crime or may help or encourage another in a crime either before or during its commission. An accomplice is considered by the law to have an interest in the outcome of the case.

If you find that either of these witnesses was an accomplice, you should examine every part of that witness' testimony with the greatest care and caution. If after doing so you believe the witness' testimony in whole or in part, you should treat what you believe the same as any other believable evidence.

Later, during the sentencing phase, he again instructed the jury concerning the witnesses' arrangements.

The fact that these witnesses had made arrangements for charge reductions in exchange for their testimony was clearly before the jury. Assignments of Error Nos. 25, 37, 38, 68, and 69 are overruled.

III. SENTENCING

In Assignments of Error Nos. 35, 40, 47, and 48, the defendant argues that the judgment and sentence for the felony murder of Eric Joines deprived him of his right to be free from double jeopardy, violated the rules of *res judicata* and collateral estoppel, constituted an unlawful multiple use of aggravating circumstances, and amounted to cruel and unusual punishment. Thus, the defendant contends that the trial court erred in denying his motions to dismiss the charges against him and to strike the aggravating circumstance of the Concord robbery-murder, in denying his motion for a directed verdict of life imprisonment at the end of the State's case and instead sentencing him to death, and in precluding the defendant from presenting certain evidence which he sought to introduce at the sentencing phase of the trial.

The trial judge submitted to the sentencing jury in this case the aggravating circumstance that the murder of Eric Joines was part of a course of conduct in which the defendant engaged and which included the commission by the defendant of other crimes of violence against another person, i.e., the robbery-murder of Susan Verle Pierce in Concord.[5] The jury found the existence of this circumstance, found that it was sufficiently substantial to call for imposition of the death penalty, found that it outweighed the seven mitigating factors they found, and recommended the death penalty. Prior to this trial, the defendant had been convicted of the murder of Mrs. Pierce in Cabarrus County. The murder of Eric Joines was found by the sentencing jury in the Concord robbery-murder case in Cabarrus County as an aggravating circumstance and the defendant received a death sentence for the Cabarrus County murder.[6]

[18] The defendant argues that the use of the Gaston County Joines murder as an aggravating circumstance in the punishment phase of the Cabarrus County Pierce murder trial (1) precludes the use of the Pierce murder as an aggravating circumstance in the Joines murder trial and (2) precludes even trying the defendant in Gaston County for the Joines murder. We do not agree. This same argument was advanced and rejected by this Court in *State v. Pinch*, — N.C. —, —, 292 S.E.2d 203, 226 (1982):[7]

> [T]he principle of double jeopardy has not evolved, as defendant argues, to the point that it prevents the prosecution from relying, at the sentencing phase of a capital case, upon a related course of criminal conduct by the defendant as an aggravating factor to enhance the punishment of defendant for another distinct offense, and this is so, irrespective of whether the defendant was also convicted of another capital charge arising out of that very same course of criminal conduct and subjected to separate punishment therefor.

The principle of double jeopardy likewise does not preclude the *trial* of the defendant for the other capital crime. The defendant was not convicted of nor punished for the murder of Joines in the prior trial. The defendant has been convicted and sentenced only once for the murder of Joines and will only once be punished therefor. There exists no prohibition for his trial for the murder of Eric Joines, nor the use of the other murder for which he stands convicted as an aggravating circumstance.

5. *See State v. Williams* (I), 304 N.C. 394, 284 S.E.2d 437.

6. We note that the death sentence has been overturned. See Footnote 2.

7. In *Pinch* the two murders occurred one immediately following the other at the same location and were joined for trial. Here, the two murders occurred in separate incidents, separate counties, and were separated in time by approximately three hours. While there are these differences, here, as in *Pinch*, the two murders occurred in the same course of conduct.

[19] Further, the defendant argues that the court erred in excluding as irrelevant evidence offered by the defendant regarding the lack of any deterrent effect of the imposition of the death penalty, the rehabilitative nature of people who have committed even heinous crimes, and the manner of execution in North Carolina. This contention is without merit, as such evidence is irrelevant. *State v. Taylor*, 304 N.C. 249, 283 S.E.2d 761 (1981); *State v. Cherry*, 298 N.C. 86, 257 S.E.2d 551. Assignments Nos. 35, 40, 47 and 48 are overruled.

In Assignments of Error Nos. 58, 72, 73, 80 and 83, the defendant argues that his sentence of death for felony murder in this case is an excessive and disproportionate penalty constituting cruel and unusual punishment; thus the trial court should have directed a verdict of life imprisonment, declared the death penalty statute unconstitutional, instructed the jury that the death sentence could be imposed only if it found that the defendant personally committed the acts causing death and intended to cause death, and refused to enter a judgment of death.

The constitutionality of our death penalty statute has been repeatedly upheld. *See*, for example, *State v. Hutchins*, 303 N.C. 321, 279 S.E.2d 788 (1981); *State v. Bush*, 289 N.C. 159, 221 S.E.2d 333 (1976); *State v. Spaulding*, 288 N.C. 397, 219 S.E.2d 178 (1975); *State v. Woodson*, 287 N.C. 578, 215 S.E.2d 607 (1975), *reversed on other grounds*, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976). The specific contention that the imposition of the death penalty for felony murder constitutes cruel and unusual punishment has also been rejected by this Court. *State v. Peplinski*, 290 N.C. 236, 225 S.E.2d 568 (1975), *cert. denied*, 429 U.S. 932, 97 S.Ct. 339, 50 L.Ed.2d 301 (1976). This Court has repeatedly upheld the death penalty in felony murder cases. *State v. Williams* (I), 304 N.C. 394, 284 S.E.2d 437; *State v. Taylor*, 304 N.C. 249, 283 S.E.2d 761; and *State v. Hutchins*, 303 N.C. 321, 279 S.E.2d 788.

[20, 21] Just as the Legislature acts within its constitutional power in defining first-degree murder to include felony murder, it is also within its constitutional power to determine that first-degree murder, including felony murder, may be punished by death, providing that the death penalty statute itself is constitutional. *See State v. Wall*, 304 N.C. 609, 286 S.E.2d 68 (1982). We do not find that the death penalty imposed below amounts to cruel and unusual punishment. These assignments of error are overruled.

[22] The defendant assigns as error (Assignment No. 50) the court's permitting the prosecutor on cross-examination of S. B. I. Agent B. M. Lee during the sentencing phase to elicit testimony concerning Darryl Brawley's prior inconsistent statements given to Agent Lee. The defendant argues that by this testimony, the State was permitted to impeach its own witness, Darryl Brawley. This is not the case. Darryl Brawley admitted on defendant's cross-examination in the guilt-innocence phase of the trial that he had changed his story about the robbery-murder several times. During the sentencing phase of the trial, in an attempt to impeach the testimony of Brawley, the defendant called S. B. I. Agent B. M. Lee as a witness. Agent Lee testified that he had a series of interviews with Brawley. The defense questioned him only about the first interview, which was inconsistent with Brawley's trial testimony. The State's cross-examination of Agent Lee elicited the contents of his other interviews of Brawley which corroborated Brawley's testimony that he kept changing his story. Thus, the rule against the State impeaching its own witness has no application here. There was no error in the State's eliciting testimony corroborating Brawley's earlier testimony after the defendant's attempt to impeach his credibility. *See State v. Carter*, 293 N.C. 532, 238 S.E.2d 493 (1977). Assignment of Error No. 50 is overruled.

[23, 24] The defendant assigns as error (Assignment No. 51) the trial judge's overruling of his objection to certain testimony of Agent Lee during the sentencing proceedings and the court's refusal to permit him to make known the nature of his objec-

tion out of the presence of the jury. The defendant contends that the witness Lee's reference to "Polygraphist Mike Humberg" when being cross-examined about Brawley's prior statement was a deliberate attempt to convey to the jury the impression that the statement given by Brawley on 11 June implicating the defendant was confirmed by a polygraph examination. This contention is without merit; it is based on mere speculation. Furthermore, the jury cannot be deemed to have inferred that a polygraph examination was conducted from the one isolated use of the word *polygraphist*. Throughout the rest of his testimony, Agent Lee referred to Mike Humberg as *Mr.* Humberg or *Officer* Humberg. No mention of any polygraph examination was ever made. Counsel may approach the bench only with the judge's permission. Rule 12, North Carolina General Rules of Practice for Superior and District Courts. The court gave counsel ample opportunity to state the basis for his objection, but he failed to do so. Although the objection was overruled, Mr. Humberg was not referred to as "polygraphist" again. There exists no reversible error here. The assignment of error is overruled.

The defendant argues that it was error (Assignments Nos. 45, 79, 85, and 86) for the judge to enter the judgment of death because the death penalty statute, and specifically G.S. § 15A-2000(e)(11), is unconstitutionally vague and because there was insufficient evidence to find beyond a reasonable doubt the existence of the aggravating circumstance submitted in this case.

[25, 26] In the sentencing phase, the State relied on a single aggravating circumstance, that provided in G.S. § 15A-2000(e)(11):

> The murder for which the defendant stands convicted was part of a course of conduct in which the defendant engaged and which included the commission by the defendant of other crimes of violence against another person or persons.

The defendant argues that the term "course of conduct" is vague and indefinite, and that for some of its possible meanings, the Joines killing and the Pierce killing were not part of the same course of conduct.[8] We do not agree.

> Sentencing standards are by necessity somewhat general. While they must be particular enough to afford fair warning to a defendant of the probable penalty which would attach upon a finding of guilt, they must also be general enough to allow the courts to respond to the various mutations of conduct which society has judged to warrant the application of the criminal sanction. *See Gregg v. Georgia*, 428 U.S. at 194–195, 49 L.Ed.2d at 886–887, 96 S.Ct. at 2935. While the questions which these sentencing standards require juries to answer are difficult, they do not require the jury to do substantially more than is ordinarily required of a factfinder in any lawsuit. *See Proffitt v. Florida*, 428 U.S. at 257–258, 49 L.Ed.2d at 926, 96 S.Ct. at 2969. The issues which are posed to a jury at the sentencing phase of North Carolina's bifurcated proceeding have a common sense core of meaning. Jurors who are sitting in a criminal trial ought to be capable of understanding them and applying them when they are given appropriate instructions by the trial court judge. *See Jurek v. Texas*, 428 U.S. at 279, 49 L.Ed.2d at 939, 96 S.Ct. at 2959 (White, J., concurring).

State v. Barfield, 298 N.C. 306, 353, 259 S.E.2d 510, 543 (1979), *cert. denied*, 448 U.S. 907, 100 S.Ct. 3050, 65 L.Ed.2d 1137, *rehearing denied*, 448 U.S. 918, 101 S.Ct. 41, 65 L.Ed.2d 1181 (1980), and —— U.S. ——, 102 S.Ct. 693, 70 L.Ed.2d 261 (1981). We are not persuaded that the term "course of

8. The defendant also argues that this aggravating circumstance requires that the defendant have committed other crimes of violence against another person or persons in the course of conduct in order for this aggravating circumstance to be submitted to the jury. He argues that since here there was only a single additional crime, the aggravating circumstance should not have been submitted. We note that there were two additional crimes committed in this course of conduct, armed robbery and murder.

conduct" is unconstitutionally vague or without definition. This Court has rejected such arguments before. *State v. Rook*, 304 N.C. 201, 283 S.E.2d 732 (1981); *State v. Barfield*, 298 N.C. 306, 259 S.E.2d 510. The trial judge instructed the jury concerning the aggravating factor as follows:

> Now, ladies and gentlemen, the murder of Eric Joines by the defendant was part of such a course of conduct if it and other crimes of violence were parts of a pattern of intentional acts directed toward the perpetration of such crimes of violence which establishes that there existed in the mind of the defendant a plan, scheme, or design involving both the murder of Eric Joines and other crimes of violence.
>
> In order for you to answer this issue yes, the State must satisfy you beyond a reasonable doubt of these things:
>
> First, that the defendant himself or acting in concert with another person took or attempted to take money from the person or presence of Mrs. Pearce at the Seven-Eleven store.
>
> As I instructed you at the end of the first phase of this trial, it is not necessary for a person himself to do all the acts required to constitute a crime in order for him to be guilty of that offense. If two or more persons act together with a common purpose to commit a crime, each is held responsible for the acts of the other.
>
> Secondly, the State must satisfy you beyond a reasonable doubt that the defendant himself or acting in concert with another person carried away the money or attempted to do so.
>
> Third, that Mrs. Pearce did not voluntarily consent to the taking and carrying away of the property.
>
> Fourth, that at the time of the taking or of the attempt to take the property the defendant himself intended to deprive Mrs. Pearce of its use permanently.
>
> Fifth, that the defendant knew that he was not entitled to take the property.
>
> Sixth, that the defendant himself or acting in concert with another person had a firearm in his possession at the time the property was taken or attempted to be taken.
>
> Seven, that the defendant himself or acting in concert with some other person obtained or attempted to obtain the property by endangering or threatening the life of Mrs. Pearce with the firearm.
>
> Eight, that while committing or attempting to commit such robbery the defendant himself or acting in concert with some other person shot Mrs. Pearce with a firearm.
>
> Nine, that the shooting was a proximate cause of Mrs. Pearce's death.
>
> A proximate cause is a cause without which her death would not have occurred.
>
> Ten, that the robbery and killing of Mrs. Pearce were part of a pattern or plan of the same or similar type intentional acts as those involved in the murder of Eric Joines.
>
> Eleven, that there existed in the mind of the defendant a plan, scheme, or design involving the robbery and killing of Eric Joines and the robbery and killing of Mrs. Pearce.

The defendant's behavior clearly comes within the conduct intended by the Legislature to be covered. Assignments numbered 45, 79, 85 and 86 are overruled.

[27-29] In Assignments of Error Nos. 60 and 78, defendant argues that the court erred in refusing to submit to the jury as a specified mitigating circumstance the fact that two accomplices received a plea bargain whereby the maximum punishment for their involvement would be limited to ten years in prison. While recognizing that the Court has rejected the same contention in *State v. Irwin*, 304 N.C. 93, 282 S.E.2d 439 (1981), the defendant requests that we reconsider our holding there. We reaffirm that holding. The fact that the defendant's accomplices received a lesser sentence is not an extenuating circumstance. It does not reduce the moral culpability of the killing nor make it less deserving of the penalty of death than other first-degree murders. *See State v. Hutchins*, 303 N.C. 321, 279 S.E.2d 788. The accomplices' punishment is not an aspect of the defendant's character or record nor a mitigating circumstance of the

particular offense. *See Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978). It bears no relevance to these factors, and thus there was no error in the judge's refusal to submit it to the jury. Moreover, the fact of the accomplices' bargains were before the jury, and had they deemed it a mitigating circumstance, they could have so considered it under the catch-all "any other circumstance ...." G.S. § 15A-2000(f)(9). These assignments are overruled.

[30, 31] In Assignment of Error No. 59, the defendant argues that the court erred in refusing to submit to the jury the defendant's use of alcohol on the night of the crime as a mitigating circumstance. There was no expert psychiatric or other evidence introduced to show that his capacity to appreciate the criminality of his conduct was impaired by alcohol, and therefore the trial court was correct in not submitting the mitigating factor in G.S. § 15A-2000(f)(6).[9] Yet, defendant contends that the fact that he drank some alcohol on the evening of the crime should have been submitted for the jury's consideration as a general mitigating circumstance. We do not agree. We do not believe that the Legislature intended the mere ingestion of alcohol to be a mitigating circumstance. "If this were true, every murderer, conceivably, would consume strong drink before taking his victim's life." *State v. Goodman*, 298 N.C. 1, 32, 257 S.E.2d 569, 589 (1979). There was no contention that the defendant was intoxicated nor that his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired. This assignment must be overruled.

[32] In Assignments of Error Nos. 74 and 75, the defendant argues that placing the burden on him to prove the mitigating circumstances by a preponderance of the evidence and failing to require the State to prove the absence of the existence of mitigating circumstances beyond a reasonable doubt is error. While recognizing that this Court has decided this issue against him, the defendant requests that we reconsider our position. We reaffirm our position and these assignments are overruled. *State v. Pinch*, — N.C. —, 292 S.E.2d 203; *State v. Barfield*, 298 N.C. 306, 259 S.E.2d 510; *State v. Johnson*, 298 N.C. 47, 257 S.E.2d 597 (1979).

[33] In Assignments of Error Nos. 81 and 82, defendant requests that we re-examine our prior rulings concerning the constitutionality of the death penalty and vacate the sentence imposed in this case on the grounds that the death penalty is applied in a discretionary and discriminatory manner. We adhere to our prior rulings, and these assignments of error are overruled. *State v. Williams* (I), 304 N.C. 394, 284 S.E.2d 437; *State v. Barfield*, 298 N.C. 306, 259 S.E.2d 510.

[34] In Assignments of Error Nos. 63, 70, and 71,[10] the defendant argues, as did the defendant in *State v. Pinch*, that it was error for the prosecutor to argue and the court to instruct the jury that if they found beyond a reasonable doubt that the aggravating circumstance existed, that it was substantially sufficient to call for the imposition of the death penalty, and that it outweighed any mitigating circumstance or circumstances found, then it would be their *duty* to recommend that the defendant be sentenced to death. We note that the court also instructed that if the jury did not find beyond a reasonable doubt any one or more of these, it would be their duty to recommend life imprisonment. As this Court pointed out in *Pinch*, this argument by the prosecutor and this instruction by the court

9. G.S. § 15A-2000(f)(6): The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired.

10. Assignment of Error No. 71 is that the court failed to instruct the jury that the State had the burden of proving beyond a reasonable doubt that the aggravating circumstance substantially outweighed the mitigating circumstances to such an extent as to call for the death penalty. This argument was not advanced in the brief and is therefore deemed abandoned. We note, however, that the judge did so instruct the jury.

are entirely proper. The defendant argues that it withdraws from the jury its final option to recommend life imprisonment notwithstanding its earlier findings. As we stated in *Pinch*:

> The jury had no such option to exercise unbridled discretion and return a sentencing verdict wholly inconsistent with the findings it made pursuant to G.S. 15A–2000(c). The jury may not arbitrarily or capriciously *impose or reject* a sentence of death. Instead, the jury may only exercise guided discretion *in making the underlying findings* required for a recommendation of the death penalty within the 'carefully defined set of statutory criteria that allow them to take into account the nature of the crime and the character of the accused.' *State v. Johnson*, 298 N.C. 47, 63, 257 S.E.2d 597, 610 (1979); *see State v. Barfield*, 298 N.C. 306, 349–52, 259 S.E.2d 510, 541–43 (1979), *cert. denied*, 448 U.S. 907, 100 S.Ct. 3050, 65 L.Ed.2d 1137 (1980).

State v. Pinch, — N.C. —, —, 292 S.E.2d 203, 227, (emphases original).

The defendant argues that even if the jury fails to find sufficient mitigating circumstance(s) which outweigh the aggravating circumstance(s) found, it may still, in its discretion, impose a sentence of life imprisonment. We find no authority for that position in G.S. § 15A–2000(c) or elsewhere. In several cases the jury has indeed done just that and returned a recommendation of life imprisonment. *State v. Taylor* (I), 298 N.C. 405, 259 S.E.2d 502 (1979); *State v. King*, 301 N.C. 186, 270 S.E.2d 98 (1980). While this was error, it was error favorable to the defendant from which the State could not appeal.

In two other cases wherein the jury found that the aggravating circumstances outweighed the mitigating circumstances but did not recommend a sentence, a life sentence was entered by the trial judge as G.S. § 15A–2000(b) requires him to do. *State v. Easterling*, 300 N.C. 594, 268 S.E.2d 800 (1980); *State v. Silhan*, 302 N.C. 223, 275 S.E.2d 450 (1981), on rehearing in Superior Court, Columbus County (Case No. 79CRS1943).

G.S. § 15A–2000(b) requires the jury to deliberate and render a sentence recommendation "based upon" two considerations: (1) whether sufficient aggravating circumstances exist and (2) whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found. The statute specifically requires that the jury sentence recommendation be "*based on these considerations*"—not unbridled discretion. G.S. § 15A–2000(b)(3). This specific mandate is clear—it requires no interpretation.

The trial judge correctly instructed the jury on this point. Indeed, to instruct the jury otherwise would permit it to disregard the procedure established by the Legislature and impose the sentence of death with unbridled discretion contrary to the dictates of *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972) and its successor cases. *See State v. Pinch*, — N.C. —, 292 S.E.2d 203; *State v. Goodman*, 298 N.C. 1, 257 S.E.2d 569. These assignments are overruled.

[35] Finally, the defendant argues that the infliction of the death penalty upon him would be an excessive and disproportionate penalty. This Court is required to review the sentence of death to determine whether it is "excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." G.S. § 15A–2000(d)(2). We do not agree that the imposition of the death penalty in this case would amount to excessive or disproportionate punishment. The facts of this case show that the defendant deliberately sought out not one, but two lone employees of business establishments in relatively isolated areas during the early morning hours when no one was around, robbed them at gunpoint, and then shot them to death at very close range with a shotgun before fleeing with the money. This was a brutal murder. We cannot say that the sentence of death imposed here is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. *See State v.*

Pinch, — N.C. —, 292 S.E.2d 203; *State v. Taylor*, 304 N.C. 249, 283 S.E.2d 761; *State v. Rook*, 304 N.C. 201, 283 S.E.2d 732 (1981); *State v. Hutchins*, 303 N.C. 321, 279 S.E.2d 788; *State v. Martin*, 303 N.C. 246, 278 S.E.2d 214, *cert. denied*, — U.S. —, 102 S.Ct. 431, 70 L.Ed.2d 240 (1981); *State v. Barfield*, 298 N.C. 306, 259 S.E.2d 510.

We have carefully examined defendant's other assignments of error not specifically treated herein. We find them to be without merit and they are overruled.

The record clearly supports the jury's guilty verdict and its finding of the aggravating circumstance upon which the sentencing court based its sentence of death. There is no evidence that the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor; nor is the sentence of death excessive or disproportionate. The defendant's conviction and the sentence imposed must be affirmed.

NO ERROR.

EXUM, Justice, dissenting as to sentence.

For the reasons stated in Part I of my dissenting opinion in *State v. Pinch*, — N.C. —, 292 S.E.2d 203 (1982), I believe it was prejudicial error for the trial judge to instruct the jury that it had a duty to recommend the death sentence if it answered certain issues favorably to the state.

For the reasons stated in Part II of my dissenting opinion in *State v. Pinch, supra*, I conclude that prospective juror Melton was improperly excused for cause in violation of *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968).

Therefore I vote to vacate the death sentence and to remand for a new sentencing hearing. I concur in the majority's conclusion that no prejudicial error occurred in the guilt phase of the case.

STATE of North Carolina

v.

Kermit SMITH, Jr.

No. 124A81.

Supreme Court of North Carolina.

June 2, 1982.

Defendant was convicted before the Superior Court, Halifax County, George M. Fountain, J., of first-degree murder, second-degree rape, and common-law robbery, and he was sentenced to death. The defendant appealed as a matter of right from judgment imposing sentence of death upon conviction of first-degree murder. Defendant's motion to bypass Court of Appeals for review of his additional convictions of second-degree rape and common-law robbery was allowed. The Supreme Court, Copeland, J., held that: (1) evidence supported submission of aggravating circumstances of felony-murder and that murder was especially heinous, atrocious or cruel, and (2) sentence of death for intentional, deliberate and senseless murder of victim was not excessive or disproportionate to penalty imposed in similar cases, considering both crime and defendant.

No error.

Exum, J., dissented as to sentence, concurred in conclusion of no error in guilt phase, and filed an opinion.

1. Criminal Law ⇐1035(6), 1039

Where defendant stood silently by and did not object to manner in which trial court handled defendant's written motions requesting individual voir dire and sequestration of jurors during voir dire and sequestration of jury and State's witnesses during trial, defendant waived whatever objection he may have had to trial court's handling of motions, and his belated complaint alleging trial judge should have permitted oral argument by counsel before any

APPENDIX 5

Judgment of the Supreme Court of North Carolina,
rendered June 22, 1982

JUDGMENT DEATH CASE

SUPREME COURT OF NORTH CAROLINA

XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX TERM, 19 82

STATE OF NORTH CAROLINA

vs.

LARRY DARNELL WILLIAMS

No. 70A81 Gaston *County.*

This cause came on to be argued upon the transcript of the record from the Superior Court Gaston *County:*

Upon consideration whereof, this Court is of opinion that there is no *error in the record and proceedings of said Superior Court.*

It is therefore considered and adjudged by the Court here that the opinion of the Court, as delivered by the

Honorable LOUIS B. MEYER, Associate *Justice, be certified to the said Superior Court, to the intent that the* XXX

PROCEEDINGS BE HAD THEREIN IN SAID CAUSE ACCORDING TO LAW AS DECLARED IN SAID OPINION

And it is considered and adjudged further, that the Defendant Do Pay

the costs of the appeal in this Court incurred, to wit, the sum of

****ONE-HUNDRED FIFTY-THREE AND 00/100**** *dollars ($* 153.00 *),*

and execution issue therefor. Certified to Superior Court this 22nd *day of* June *19* 82.

A TRUE COPY

J. GREGORY WALLACE

Clerk of the Supreme Court,

By Chief Deputy Clerk

Commercial Printing Co., Raleigh, N. C.

APPENDIX C

North Carolina General Statutes,
Chapter 15A, Article 100
Capital Punishment

(N.C. Gen. Stats. §§15A-2000, 2001, 2002 and 2003)

SUBCHAPTER XV. CAPITAL PUNISHMENT.

ARTICLE 100.

Capital Punishment.

§ 15A-2000. Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence.

(a) Separate Proceedings on Issue of Penalty. —

(1) Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment. A capital felony is one which may be punishable by death.

(2) The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable after the guilty verdict is returned. If prior to the time that the trial jury begins its deliberations on the issue of penalty, any juror dies, becomes incapacitated or disqualified, or is

discharged for any reason, an alternate juror shall become a part of the jury and serve in all respects as those selected on the regular trial panel. An alternate juror shall become a part of the jury in the order in which he was selected. If the trial jury is unable to reconvene for a hearing on the issue of penalty after having determined the guilt of the accused, the trial judge shall impanel a new jury to determine the issue of the punishment. If the defendant pleads guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose. A jury selected for the purpose of determining punishment in a capital case shall be selected in the same manner as juries are selected for the trial of capital cases.

(3) In the proceeding there shall not be any requirement to resubmit evidence presented during the guilt determination phase of the case, unless a new jury is impaneled, but all such evidence is competent for the jury's consideration in passing on punishment. Evidence may be presented as to any matter that the court deems relevant to sentence, and may include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (e) and (f). Any evidence which the court deems to have probative value may be received.

(4) The State and the defendant or his counsel shall be permitted to present argument for or against sentence of death. The defendant or defendant's counsel shall have the right to the last argument.

(b) Sentence Recommendation by the Jury. — Instructions determined by the trial judge to be warranted by the evidence shall be given by the court in its charge to the jury prior to its deliberation in determining sentence. In all cases in which the death penalty may be authorized, the judge shall include in his instructions to the jury that it must consider any aggravating circumstance or circumstances or mitigating circumstance or circumstances from the lists provided in subsections (e) and (f) which may be supported by the evidence, and shall furnish to the jury a written list of issues relating to such aggravating or mitigating circumstance or circumstances.

After hearing the evidence, argument of counsel, and instructions of the court, the jury shall deliberate and render a sentence recommendation to the court, based upon the following matters:

(1) Whether any sufficient aggravating circumstance or circumstances as enumerated in subsection (e) exist;

(2) Whether any sufficient mitigating circumstance or circumstances as enumerated in subsection (f), which outweigh the aggravating circumstance or circumstances found, exist; and

(3) Based on these considerations, whether the defendant should be sentenced to death or to imprisonment in the State's prison for life.

The sentence recommendation must be agreed upon by a unanimous vote of the 12 jurors. Upon delivery of the sentence recommendation by the foreman of the jury, the jury shall be individually polled to establish whether each juror concurs and agrees to the sentence recommendation returned.

If the jury cannot, within a reasonable time, unanimously agree to its sentence recommendation, the judge shall impose a sentence of life imprisonment; provided, however, that the judge shall in no instance impose the death penalty when the jury cannot agree unanimously to its sentence recommendation.

(c) Findings in Support of Sentence of Death. — When the jury recommends a sentence of death, the foreman of the jury shall sign a writing on behalf of the jury which writing shall show:

(1) The statutory aggravating circumstance or circumstances which the jury finds beyond a reasonable doubt; and

(2) That the statutory aggravating circumstance or circumstances found by the jury are sufficiently substantial to call for the imposition of the death penalty; and,

(3) That the mitigating circumstance or circumstances are insufficient to outweigh the aggravating circumstance or circumstances found.

(d) Review of Judgment and Sentence. —

(1) The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of North Carolina pursuant to procedures established by the Rules of Appellate Procedure. In its review, the Supreme Court shall consider the punishment imposed as well as any errors assigned on appeal.

(2) The sentence of death shall be overturned and a sentence of life imprisonment imposed in lieu thereof by the Supreme Court upon a finding that the record does not support the jury's findings of any aggravating circumstance or circumstances upon which the sentencing court based its sentence of death, or upon a finding that the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor, or upon a finding that the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. The Supreme Court may suspend consideration of death penalty cases until such time as the court determines it is prepared to make the comparisons required under the provisions of this section.

(3) If the sentence of death and the judgment of the trial court are reversed on appeal for error in the post-verdict sentencing proceeding, the Supreme Court shall order that a new sentencing hearing be conducted in conformity with the procedures of this Article.

(e) Aggravating Circumstances. — Aggravating circumstances which may be considered shall be limited to the following:

(1) The capital felony was committed by a person lawfully incarcerated.

(2) The defendant had been previously convicted of another capital felony.

(3) The defendant had been previously convicted of a felony involving the use or threat of violence to the person.

(4) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(5) The capital felony was committed while the defendant was engaged, or was an aider or abettor, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any [homicide,][1] robbery, rape [or a sex offense,][2] arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.

(6) The capital felony was committed for pecuniary gain.

(7) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(8) The capital felony was committed against a law-enforcement officer, employee of the Department of Correction, jailer, fireman, judge or justice, former judge or justice, prosecutor or former prosecutor, juror or former juror, or witness or former witness against the defendant, while engaged in the performance of his official duties because of the exercise of his official duty.

(9) The capital felony was especially heinous, atrocious, or cruel.

(10) The defendant knowingly created a great risk of death to more than one person by means of a weapon or device which would normally be hazardous to the lives of more than one person.

[(11) The murder for which the defendant stands convicted was part of a course of conduct in which the defendant engaged and which included the commission by the defendant of other crimes of violence against another person or persons.][3]

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1 Bracketed portion added by a amendment of June 22, 1981, effective upon ratification. 1981, Sess. Laws, c. 652.

2 Bracketed portion added by 1979 amendment, effective January 1, 1980. 1979 Sess. Laws, c. 682, ss. 9, 14.

3 Bracketed portion added by amendment of May 14, 1979, effective upon ratification. 1979 Sess. Laws, c. 565.

(f) Mitigating Circumstances. — Mitigating circumstances which may be considered shall include, but not be limited to, the following:

(1) The defendant has no significant history of prior criminal activity.
(2) The capital felony was committed while the defendant was under the influence of mental or emotional disturbance.
(3) The victim was a voluntary participant in the defendant's homicidal conduct or consented to the homicidal act.
(4) The defendant was an accomplice in or accessory to the capital felony committed by another person and his participation was relatively minor.
(5) The defendant acted under duress or under the domination of another person.
(6) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired.
(7) The age of the defendant at the time of the crime.
(8) The defendant aided in the apprehension of another capital felon or testified truthfully on behalf of the prosecution in another prosecution of a felony.
(9) Any other circumstance arising from the evidence which the jury deems to have mitigating value. (1977, c. 406, s. 2; 1979, c. 565, s. 1; c. 682, s. 9; 1981, c. 652, s. 1.)

GENERAL STATUTES OF NORTH CAROLINA

1978 Replacement Volume 1C

§ 15A-2001. Capital offenses; plea of guilty. — Any person who has been indicted for an offense punishable by death may enter a plea of guilty at any time after his indictment, and the judge of the superior court having jurisdiction may sentence such person to life imprisonment or to death pursuant to the procedures of G.S. 15A-2000. Before sentencing the defendant, the presiding judge shall impanel a jury for the limited purpose of hearing evidence and determining a sentence recommendation as to the appropriate sentence pursuant to G.S. 15A-2000. The jury's sentence recommendation in cases where the defendant pleads guilty shall be determined under the same procedure of G.S. 15A-2000 applicable to defendants who have been tried and found guilty by a jury. (1977, c. 406, s. 2.)

§ 15A-2002. Capital offenses; jury verdict and sentence. — If the recommendation of the jury is that the defendant be sentenced to death, the judge shall impose a sentence of death in accordance with the provisions of Chapter 15, Article 19 of the General Statutes. If the recommendation of the jury is that the defendant be imprisoned for life in the State's prison, the judge shall impose a sentence of imprisonment for life in the State's prison. (1977, c. 406, s. 2.)

§ 15A-2003. Disability of trial judge. — In the event that the trial judge shall become disabled or unable to conduct the sentencing proceeding provided in this Article, the Chief Justice shall designate a judge to conduct such proceeding. (1977, c. 406, s. 2.)

APPENDIX D

State of North Carolina v. Michael Edward Pinch
N.C., 292 S.E.2d 203

STATE of North Carolina

v.

Michael Edward PINCH.

No. 43A81.

Supreme Court of North Carolina.

June 2, 1982.

Defendant was convicted before the Superior Court, Guilford County, Hal Hammer Walker, J., of first-degree murder and was sentenced to death. Defendant appealed. The Supreme Court, Copeland, J., held that: (1) both guilt and sentencing phases of defendant's trial were competently conducted without accompaniment of constitutional defect or prejudicial error; (2) judgments of death were lawfully imposed; and (3) death sentence was not excessive or disproportionate considering premeditated and calloused manner in which defendant calmly shot and killed two people in cold blood, suddenly and without any provocation by them, for reasons exhibiting a wanton disregard for human life.

No error.

Exum, J., dissented and filed an opinion.

Carlton, J., concurred and filed an opinion in which Branch, C. J., joined.

1. Jury ⇐108

Prospective jurors were properly excused for cause from capital case after they each stated unequivocally that, even before hearing any evidence in case, they could not under any circumstances impose death penalty upon defendant.

2. Jury ⇐108

Prospective juror's statement that she did not think she could impose death penalty in capital case under any circumstances constituted an expression of a sufficient refusal to follow the law, that of capital punishment, to warrant excusal for cause.

3. Constitutional Law ⇐267
Jury ⇐33(2.1)

Excusal of jurors from capital case for cause due to their stated opposition to the death penalty did not deprive defendant of his constitutional rights to trial by a jury representing a cross section of the community or to due process of law. U.S.C.A. Const.Amends. 5, 6, 14.

4. Criminal Law ⇐717

District attorney's statement in final argument that defense of intoxication to charge of first-degree murder required intoxication to such a degree as to render defendant utterly and totally incapable of forming intent to kill and to carry out intent correctly conveyed substance of law of intoxication to jury.

5. Criminal Law ⇐720(9)

District attorney's remarks in closing argument with respect to intoxication defense to charge of first-degree murder, although colorful in terminology, were compatible with evidence in case.

6. Criminal Law ⇐720(9)

District attorney was authorized to argue to jury that facts did not support a credible defense of intoxication to charge of first-degree murder.

7. Criminal Law ⇐778(5)

In prosecution for first-degree murder, trial court's instructions upon intoxication defense were entirely correct, and did not shift burden to defendant to disprove his capacity to form a specific intent to kill after premeditation and deliberation.

8. Criminal Law ⇐666½

A prosecutor has an implicit duty not to obstruct defense attempts to conduct interviews with any witnesses.

9. Criminal Law ⇐1168(2)

Reversal for a prosecutor's obstruction of defense attempts to conduct interviews with witnesses is only warranted when it is clearly demonstrated that prosecutor affirmatively instructed a witness not to cooperate with defense.

10. Criminal Law ⇐1168(2)

In absence of anything in record to substantiate defendant's claim of prosecutorial misbehavior in refusing to allow State's eyewitnesses to be interviewed by a medical expert who had been appointed to assist in preparation and evaluation of defendant's intoxication defense, reversal was not warranted.

11. Criminal Law ⇐1168(2)

Where there was no evidence tending to show that defense counsel actually approached State's witnesses for stated purpose of arranging interviews with a medical expert who had been appointed to assist in preparation and evaluation of defendant's intoxication defense only to be rejected on account of district attorney's prior, direct instructions to witnesses not to cooperate with defense, prosecutorial misbehavior warranting reversal was not demonstrated.

12. Criminal Law ⇐666½

Where bare summary of proceedings held by trial court on defendant's motion for an order directing district attorney to make State's eyewitnesses available for interviews with medical expert who had been appointed to assist in preparation and evaluation of defendant's intoxication defense made it plain that witnesses themselves refused to talk with defense expert on advice of their own individual attorneys, trial court did not err in denying motion.

13. Criminal Law ⇐633(1), 641.12(1)

In view of alternative methods for defendant's medical witness to obtain necessary information from State's eyewitnesses in order to assist in preparation and evaluation of intoxication defense, including attendance at trial and listening to witnesses' testimony or taking notes on testimony or relaying a transcript to expert for his formulation of opinion upon extent of defendant's impairment from intoxication at time of killings, trial court's denial of pretrial motion for order directing district attorney to make eyewitnesses available for interviews with expert did not deprive defendant of effective assistance of counsel or a fair trial.

14. Criminal Law ⇐1153(4)

Scope of cross-examination rests largely within discretion of trial court, and its rulings thereon will not be disturbed absent a clear showing of abuse or prejudice.

15. Witnesses ⇐268(1)

Defendant's constitutional rights of confrontation and due process were not unlawfully restricted by trial court's sustaining prosecutor's objections to defendant's cross-examination of State's witnesses concerning amount of beer drunk by defendant on night of murders, his level of intoxication and nature of his behavior in light of failure to demonstrate error in trial court's limiting scope of cross-examination.

16. Criminal Law ⇐1170½(1)

Defendant had no cause for complaint on appeal of trial court's sustension of prosecutor's objections to defendant's cross-examination of State's witnesses concerning amount of beer drunk by defendant on night of murders, his level of intoxication, and nature of his behavior where defendant effectively received benefit of evidence sought after in that, in several instances, witnesses actually answered questions of defense counsel despite prosecutor's objections and trial court's sustension thereof, prosecutor did not move to strike answers, and trial court did not admonish jury to disregard them.

17. Homicide ⇐164

Trial court's exclusion on recross-examination of defendant's question to expert medical witness as to whether murder victims were legally intoxicated at time of their deaths was proper in that question concerned irrelevant matters which had no logical tendency to prove a fact in issue at defendant's trial for murder.

18. Criminal Law ⇐1170(4)

Defendant was not prejudiced by trial court's exclusion on recross-examination of defendant's question to expert medical witness as to whether victims were legally intoxicated at time of their death where witness had already repeatedly stated during his direct, cross and redirect examina-

tions that the blood alcohol levels of both victims indicated their intoxication at death.

19. Criminal Law ⇐338(1)

Defense counsel's questioning of witness about whether witness was influenced by alcohol he had drunk on night of murders, as to whether witness had ever seen defendant when he was not "high" on drugs or alcohol, and as to whether defendant and a friend were "drunk" when they "mooned" a police officer earlier in evening of murders did not seek to elicit relevant information having a direct bearing upon defendant's intoxication impairment at time he committed murders, and thus trial court's sustension of prosecutor's objections to such questions and its rulings thereon did not improperly hinder defendant's efforts to present intoxication defense.

20. Criminal Law ⇐464

Trial court's sustension of prosecutor's objections to questions which were not competently framed to elicit witness' opinion about defendant's general intoxication based upon precise legal meaning of that term did not improperly hinder defendant's efforts to present his intoxication defense.

21. Criminal Law ⇐1166.22(2), 1171.1(3)

In light of defendant's affirmative admissions throughout trial of existence of malice and unlawfulness in his commission of two "second degree" murders, there could not possibly be any constitutional transgressions or prejudice in remarks of either prosecutor or trial court concerning presumption of existence of those very same elements in charges of first-degree murder.

22. Criminal Law ⇐1166.22(7), 1171.3

Where trial court's and prosecutor's use of presumption of existence of malice and unlawfulness in charges of first-degree murder did not alleviate in any manner State's overall burden of proving existence of every element of first-degree murder beyond a reasonable doubt, there could not possibly be any constitutional transgressions or prejudice in remarks of either prosecutor or trial court concerning such presumption.

23. Stipulations ⇐14(10)

Illustrative relevancy of photographs depicting appearance of victims' bodies at time of forensic pathologist's examination, which directly corresponded to forensic pathologist's testimony, was not nullified by defendant's "stipulation" as to cause of death.

24. Criminal Law ⇐438(5)

State's introduction of ten photographs depicting appearance of murder victims' bodies at time of forensic pathologist's examinations was not an introduction of an impermissibly excessive number of photographs under circumstances of case.

25. Criminal Law ⇐438(7)

Probative force of photographs' depictions of unattractive markings of victims' violent deaths, as seen by examining forensic pathologist, was not outweighed by their tendency to repulse the sensibilities or to arouse the sympathy of the viewer; thus, introduction of photographs into evidence in prosecution for first-degree murder was not error.

26. Criminal Law ⇐1037.1(1)

Despite absence of objection, State's argument in capital cases is subject to limited appellate review for existence of gross improprieties which make it plain that trial court abused its discretion in failing to correct prejudicial matters ex mero motu.

27. Criminal Law ⇐720(9)

In view of testimony of eyewitness that defendant had a grin on his face when he shot victims and testimony of police officer that defendant had told him that his only regret about the death of one victim was that he would not be able to kill him again, district attorney's remarks during closing argument about defendant's enjoyment of killings were not improper but were supported by evidence and reasonable inferences therefrom.

28. Criminal Law ⇐728(5)

District attorney's statements during final argument describing what defendant

must have been thinking as he sat quietly behind bar holding shotgun immediately prior to killings were not so prejudicial that trial court was required to take corrective action even in absence of an objection.

29. Criminal Law ⇐728(5)

Where district attorney's uncomplimentary and disparaging characterization of defendant as an animal who killed for pleasure was entirely warranted by evidence, there was no gross error in characterization requiring trial court to take corrective action even in absence of an objection.

30. Criminal Law ⇐986.1

Scope of argument at sentencing hearing is governed by same general rules that apply to argument during guilt proceedings.

31. Criminal Law ⇐1042

When prosecutorial remarks during sentencing phase of trial were not objected to at trial, alleged impropriety must be glaring or grossly egregious for Supreme Court to determine that trial judge erred in failing to take corrective action sua sponte.

32. Criminal Law ⇐986.1, 1177

Where evidence in capital case reasonably supported conclusion that defendant enjoyed committing killings, district attorney's further extrapolations during sentencing phase about the unusually callous and playful nature of defendant's murderous acts were legitimate under evidence and were not extreme or prejudicial per se.

33. Criminal Law ⇐986.2(1)

Circumstances of offense and defendant's age, character, education, environment, habits, mentality, propensities and criminal record are generally relevant to mitigation in sentencing; however, ultimate issue concerning admissibility of such evidence must still be decided by presiding trial judge, and his decision is guided by usual rules which exclude repetitive or unreliable evidence or that lacking an adequate foundation.

34. Criminal Law ⇐986.2(1)

Evidentiary flexibility is encouraged in serious and individualized process of life or death sentencing.

35. Criminal Law ⇐986.2(3)

As in any proceeding, evidence offered at sentencing must be pertinent and dependable and, if it passes such test in first instance, it should not ordinarily be excluded. G.S. § 15A-2000(a)(3).

36. Criminal Law ⇐996(1.1)

New sentencing hearing in capital case should not be ordered by Supreme Court for trial judge's exclusion of evidence at penalty phase unless defendant demonstrates existence of patent, prejudicial error. G.S. § 15A-2000.

37. Criminal Law ⇐986.2(3)

In light of fact that there was substantial evidence of defendant's regrets for killings already in evidence, it was not error for trial court to exclude upon objection further testimony upon same subject by witness.

38. Criminal Law ⇐1177

Trial court's limited admission of defendant's five proffered exhibits consisting of letters he had written to his mother while he was incarcerated pending trial was not reversible error in that letters added little to in-court testimony of defendant and his witnesses about his present awareness of what he had done and his sorrow for it.

39. Criminal Law ⇐986.2(3)

Although defendant's habits regarding alcohol and drug misuse were relevant mitigating factors for jury's consideration in capital case, precise details of his particular overdoses were not pertinent to his sentencing; thus, trial court did not err in refusing to permit witness to testify about circumstances of defendant's various hospitalizations for drug overdoses. G.S. § 15A-2000(a)(3).

40. Criminal Law ⇐986.2(3)

Trial court correctly sustained prosecutor's objection at sentencing hearing to defense counsel's attempt to elicit an opinion from a psychiatrist about whether defendant would be able to adjust to life in prison

where such an opinion would have concerned a matter totally irrelevant to sentencing of defendant convicted of two first-degree murders since, regardless of his ability to adjust to prison life, defendant was already subject to mandatory imposition of life imprisonment. G.S. §§ 14-17, 15A-2000(a)(1), 15A-2002.

41. Criminal Law ⇐469

Even assuming that defendant's ability to cope in prison had some slight relevance to his sentencing following conviction of two first-degree murders, psychiatrist's opinion about whether defendant would be able to adjust to life in prison was properly excluded where there was an insufficient foundation in record for a conclusion that he was better qualified to have an opinion on this subject than the jury. G.S. § 15A-2000.

42. Criminal Law ⇐473

Where psychiatrist admitted that he could not render an opinion about defendant's blood alcohol level at time of shootings within a reasonable degree of medical certainty, evidence, although relevant, was unreliable and lacked probative value, and thus was properly excluded at sentencing hearing. G.S. § 15A-2000.

43. Witnesses ⇐266

General rule that truthfulness of any aspect of any witness's testimony may be attacked on cross-examination applies to all trial proceedings, including both guilt and sentencing phases in capital cases.

44. Criminal Law ⇐1171.8(2)

Defendant's ability to afford alcohol and drugs bore upon credibility of his self-serving statements about their constant use, introduced as mitigating factors in sentencing phase of capital case, so that prosecutor's repeated questioning of defendant as to specific source of money to buy all the beer and drugs he allegedly consumed did not constitute prejudicial error despite defendant's contention that the persistent questioning about money improperly suggested to jury that he must have committed other criminal offenses to support his habits.

45. Witnesses ⇐280, 282½

Persistent nature of prosecutor's questioning of defendant during sentencing phase of capital case as to source of money used to buy all the beer and drugs which defendant said he had taken every day for five years was not abusive in light of defendant's evasive and unresponsive answers.

46. Witnesses ⇐277(2)

Scope and fairness of cross-examination of defendant during sentencing phase of capital case was a matter left to sole discretion of trial judge, and prosecutor had a right to sift or press defendant in order to get a direct and clear response to his questions as to source of money used to buy all the beer and drugs which defendant said he had taken every day for five years.

47. Criminal Law ⇐730(3)

Although defendant's objection to prosecutor's inferential inquiry during sentencing phase of capital case as to whether stealing was specific source of money used to buy all the beer and drugs which defendant said he had taken every day for five years was well taken in that question amounted to speculative insinuation of prior criminal conduct with no ascertainable good-faith factual basis, trial court's prompt sustension of defendant's objection to disapproved question sufficiently averted any prejudice to defendant in light of fact that it was a single impropriety.

48. Criminal Law ⇐1171.1(2)

Prosecutorial statements are not placed in an isolated vacuum on appeal; fair consideration must be given to context in which remarks were made and to overall factual circumstances to which they referred.

49. Criminal Law ⇐700

Prosecutor of a capital case has a duty to pursue ardently the goal of persuading jury that facts in evidence warrant imposition of ultimate penalty. G.S. § 15A-2000(a)(4).

50. Criminal Law ⇐724(2)

District attorney's comment during jury argument in penalty phase of capital case that defendant was "not Jack the Ripper yet" did not overstep bounds of permissible argument where comment was tempered by prior explanation to jury that it could consider any facts or circumstances which it deemed to have mitigating value, including defendant's admitted lack of significant criminal history. G.S. § 15A-2000.

51. Criminal Law ⇐713

District attorney's expressions during jury argument in penalty phase of capital case concerning his belief in death penalty and propriety of imposition in instant case did not overstep bounds of permissible argument in view of fact that such expressions had to be weighed with his frequent reminders to jury that it would have to determine what appropriate punishment should be. G.S. § 15A-2000.

52. Criminal Law ⇐724(2)

District attorney's characterization during jury argument in sentencing phase of capital case of defendant's mind as a "cesspool" could not be deemed unfair in light of defendant's own admissions that he killed victims intentionally and maliciously simply because one of victims had wrongfully worn insignia or emblem of defendant's motorcycle gang sometime in the past. G.S. § 15A-2000.

53. Criminal Law ⇐723(1)

District attorney's statement to jury during sentencing phase of capital case that it would not have hesitated to give defendant his "just reward" right there on the spot if it had actually witnessed murders, although disapproved, was not an inflammatory invitation for jury to act like a lynch mob in light of fact that district attorney noted that law did not work that way. G.S. § 15A-2000.

54. Criminal Law ⇐1171.1(6)

District attorney's complaints during jury argument in sentencing phase of capital case about how he could not bring in family members to testify about "trials and travails" of murder victims' lives, in contrast to all of evidence about defendant's family and personal history received in mitigation, contained nothing inherently prejudicial since district attorney was merely reminding jury that, although it did not know much about him, it should also carefully consider value of victim's life in making its life or death decision about defendant. G.S. § 15A-2000.

55. Criminal Law ⇐796

Common sense, fundamental fairness, and judicial economy dictated that any reasonable doubt concerning submission of a statutory or requested mitigating factor be resolved in defendant's favor to insure the accomplishment of complete justice at first sentencing hearing. G.S. § 15A-2000.

56. Criminal Law ⇐1172.9

Same standard of appellate review continues to apply whether trial court commits error at guilt phase or penalty phase; thus, a new sentencing hearing will not be ordered for erroneous failure to submit a mitigating circumstance if that error was harmless beyond a reasonable doubt. G.S. § 15A-1443(b).

57. Criminal Law ⇐1177

Defendant demonstrates reversible error in trial court's omission or restriction of a statutory or timely requested mitigating circumstance in a capital case only if he affirmatively establishes that particular factor was one which jury could have reasonably deemed to have mitigating value, that there was sufficient evidence of existence of factor, and that, considering case as a whole, exclusion of factor from jury's consideration resulted in ascertainable prejudice to defendant. G.S. § 15A-2000.

58. Criminal Law ⇐986.2(1)

Mentality of a defendant is generally relevant to sentencing and it can, with supporting evidence, be properly considered in mitigation of a capital felony. G.S. § 15A-2000.

59. Homicide ⇐311

Although fact that defendant had scored 66 on an intelligence test unquestion-

ably related to defendant's mentality, and defendant would have been entitled to an instruction about specific intelligence quotient if he had tendered properly worded request therefor, defendant's evidence, including testimony of psychiatrist that defendant's other tests indicated his I.Q. was probably a little higher than 66 and fell at least into low-normal range of intelligence, did not authorize submission of instruction to jury during sentencing phase of capital case as to his "relatively low mentality." G.S. § 15A-2000.

60. Homicide ⇐341

Trial court's omission, during sentencing phase of capital case, of defendant's requested instruction on his "relatively low mentality" was not prejudicial, despite psychiatrist's testimony that defendant's intelligence quotient fell at least into low-normal range of intelligence, since jury could have elected to consider such factor under trial court's instruction permitting jury to evaluate any other circumstances arising from evidence which it deemed to have mitigating value. G.S. § 15A-2000(f)(9).

61. Homicide ⇐311

Psychiatrist's testimony during sentencing phase of capital case that defendant had "psychological problems" and was "a very passive person that exhibits *some* chronic depression in terms of how he functions in life," but that defendant was "not basically a violent person" and that there was no evidence "that he was an angry acting out type person that you ordinarily find in people that are prone to violence" did not support submission upon trial court's own motion of statutory mitigating circumstances that defendant committed murders while he was "under the influence of a mental or emotional disturbance." G.S. § 15A-2000(f)(2).

62. Homicide ⇐341

Trial court's failure to submit sua sponte, during sentencing phase, statutory mitigating circumstances that defendant committed murders while he was "under the influence of a mental or emotional disturbance" did not constitute prejudicial error since jury could have elected to consider such factor pursuant to trial court's instruction upon open-ended provision of capital punishment statute permitting jury to evaluate any other circumstances arising from evidence which it deemed to have mitigating value. G.S. § 15A-2000(f)(2, 9).

63. Criminal Law ⇐161

Submission of each of two killings as an aggravating circumstance for the other under the "course of conduct" provision of capital punishment statute at initial sentencing hearing jointly held on dual capital convictions did not violate protection against double jeopardy. U.S.C.A.Const. Amends. 5, 14; G.S. § 15A-2000(e)(11).

64. Criminal Law ⇐161

Thrust of concept of double jeopardy is that a defendant may not be unfairly subjected to multiple prosecutorial attempts to obtain a conviction or a certain penalty for same offense nor may a defendant receive multiple punishment for same offense. U.S.C.A.Const.Amends. 5, 14.

65. Criminal Law ⇐163

Principle of double jeopardy does not prevent prosecution from relying, at sentencing phase of capital case, upon a related course of criminal conduct by defendant as an aggravating factor to enhance punishment of defendant for another distinct offense, and this is so irrespective of whether defendant was also convicted of another capital charge arising out of that very same course of criminal conduct and subjected to separate punishment therefor. U.S.C.A. Const.Amends. 5, 14; G.S. § 15A-2000.

66. Criminal Law ⇐796

Trial court's direction to jury in sentencing phase of capital case that it need not specify which mitigating circumstances on written list it found, while not the better practice, did not constitute error. G.S. § 15A-2000.

67. Criminal Law ⇐884

Jury may not arbitrarily or capriciously impose or reject a sentence of death; instead, jury may only exercise guided discretion in making underlying findings required

for a recommendation of death penalty within carefully defined set of statutory criteria that allows them to take into account the nature of the crime and the character of the accused. G.S. § 15A-2000(b, c).

68. Criminal Law ⇐796

Jury was correctly informed during sentencing phase of capital case that it had a duty to recommend a sentence of death if it made the three findings necessary to support such a sentence under capital punishment statute. G.S. § 15A-2000(c).

69. Homicide ⇐311

Submission to jury in sentencing phase of capital case of aggravating circumstance that murders were especially heinous, atrocious, or cruel is appropriate only when there is evidence of excessive brutality beyond that normally present in any killing, or when facts as a whole portray commission of a crime which was conscienceless, pitiless or unnecessarily tortuous to victim. G.S. § 15A-2000(e)(9).

70. Homicide ⇐354

Evidence of defendant's careful execution of deliberate and premeditated plan for murder and that deaths of both unsuspecting victims were not instantaneous and involved infliction of unusual physical or psychological torture was sufficient to support finding of jury that murders were especially despicable and wanton under capital punishment statute. G.S. § 15A-2000(e)(9).

71. Criminal Law ⇐1206(1)

Death sentence review mandated by capital punishment statute provides a sufficient constitutional safeguard against unconstitutional imposition of cruel and unusual punishment. G.S. § 15A-2000(d)(2).

72. Criminal Law ⇐1206(2)—

Intended ultimate emphasis of proportionality review of a death sentence under capital punishment statute is upon independent consideration of individual defendant and nature of crime or crimes which he has committed. G.S. § 15A-2000(d)(2).

73. Criminal Law ⇐1206(1)

Bifurcated trial proceedings of capital punishment statute, in which same jury determines both guilt and punishment issues, and resultant use of challenges for cause to excuse therefrom prospective jurors who are unequivocally opposed to death penalty, are constitutional. G.S. § 15A-2000.

74. Criminal Law ⇐1206(1)

Submission in appropriate cases, of sufficiently clear statutory aggravating circumstance of capital punishment statute that capital felony is "especially heinous, atrocious, or cruel" is constitutional. G.S. § 15A-2000(e)(9).

75. Criminal Law ⇐1206(1)

Placing burden on defendant, in capital case, to persuade jury, by a preponderance of the evidence, that a particular mitigating circumstance exists is constitutional. G.S. § 15A-2000.

In relevant part, the evidence for the State tended to show the following. On 16 October 1979, defendant, a nineteen year old white male, was walking on Merritt Drive in Greensboro with his friend Jimmy Eanes when he happened to meet Freddie Pachaco. Defendant did not like Pachaco because he had been friendly with a girl defendant liked and had, without proper entitlement, worn the personal insignia ("colors") of a motorcycle gang on his jacket. On this occasion, defendant told Eanes that he "hated that punk" (Pachaco) and wanted to fight him right then and there. This did not occur, however, because Pachaco was conciliatory and offered defendant some marijuana. The group then went to a trailer where they smoked marijuana and drank beer. Sometime later, Pachaco asked defendant outright whether he was "after" him. Defendant replied that he was not and further said that "if [he] was going to kick [Pachaco's] ass, [he] would have already done it."

On the following day starting at about noon, several people began to congregate at the trailer, where defendant apparently lived, to drink beer and listen to music.

The merrymakers included Jimmy Eanes, Shawn Feeney, Keith Way, Billy Stanley and Leslie Hearl (who later married Stanley before trial). Pachaco and his friend Tommy Ausley also unexpectedly joined the party and bought two cases of beer. Everybody was calm and pleasant and seemed to be having a good time. However, defendant told several of his friends during the course of the party that he disliked, or didn't have "much use for", Pachaco and said he would like to kill him. Later in the evening, defendant took Feeney's shotgun and fired it at the clothesline three times. A deputy sheriff came to the trailer to investigate the disturbance, but he soon departed after talking to defendant.

Upon defendant's suggestion, everyone decided to leave the trailer and go to the Stroker Motorcycle Clubhouse, which was located in some woods near Wendover Avenue in Greensboro. Defendant had reasoned that they could make as much noise as they wanted to out there and get more beer besides. [It was approximately 10:00 p. m.] While everyone prepared to move, defendant quickly slipped out to a nearby trailer where he borrowed a shotgun. He returned with the gun and told Eanes to ride with Pachaco and Ausley to make sure they got to the clubhouse. The entire party then proceeded to the rendezvous in various vehicles, caravan style. En route, defendant retained the shotgun and told his companions that he was going to kill Pachaco and Ausley.

When the group arrived at the clubhouse, defendant opened the door while he continued to hold the shotgun. Once inside, the members of the party played games, drank beer and listened to music. Billy Stanley and Leslie Hearl left the company and went into an adjacent room to have sexual intercourse. While everyone else engaged in these various recreational activities, defendant sat silently behind the bar with the shotgun in his lap. Sometime later, defendant gave his knife to Eanes and instructed him to cut Pachaco's jugular vein and promised to back him up with the shotgun. Eanes attacked Pachaco but only succeeded in cutting him on the throat. Pachaco became emotional at this point but did not fight back. Ausley attempted to help Pachaco and was confronted by Eanes who threw a chair at him. At this point in the evening's events, the testimony of the eyewitnesses differed somewhat. Nevertheless, the overall weight of that testimony combined with the evidence of defendant's own pre-trial statements to law officers tended to show the following occurrences.

Immediately after the throat-slashing incident between Eanes and Pachaco, defendant raised the shotgun and pointed it at Pachaco. Pachaco told defendant, "I will go down laughing." Without saying a word, defendant shot him in the chest. Defendant then turned toward Ausley, whom he had never seen before that day. Ausley pleaded with defendant and said, "don't shoot me," "[n]o, not me." Defendant shot him anyway. Pachaco was still moaning. Defendant walked over to where he lay helpless on the floor and shot him again at point blank range just below the heart. Pachaco and Ausley died from the gunshot wounds. During the shootings, defendant had "a sort of grin" on his face.

Defendant, apparently with a full realization of what he had just done, walked outside to the porch of the clubhouse and told Feeney and Way that he had "blown away" two dudes. He then directed everyone to help him dispose of the bodies. The bodies were placed in an automobile which Eanes drove to Causey Street and abandoned in a ditch. Defendant did not return to his residence; instead, he went home with Stanley and Hearl. On the way, he told Stanley that he had killed Pachaco and Ausley because he "didn't have any use for people like that." Defendant was not upset and seemed to have no regrets about the murders. He went to sleep. The next day, Stanley and Hearl returned to the clubhouse at defendant's behest and cleaned up the blood on the floor. Another member of the Stroker motorcycle gang painted the steps to conceal bloodstains.

The bloody car and bodies of Pachaco and Ausley were discovered in the early morn-

ing hours of 19 October 1979. Defendant took a bus to California where he was subsequently arrested on 28 January 1980. Defendant waived extradition on 4 February 1980 and was picked up by two officers of the Greensboro Police Department two days later. During the flight back to North Carolina, defendant made a full confession to the murders. [He was advised of his constitutional rights and executed the required waiver form.]

Defendant presented no independent evidence during the guilt determination phase of the proceedings. The defense did, however, elicit evidence during cross-examination of prosecution witnesses tending to show that defendant was drunk when the killings occurred.

The jury found defendant guilty of two counts of first-degree murder. The State relied on its evidence presented during the guilt phase of the trial and did not offer additional evidence during the sentencing hearing. The State did, however, argue that the murders were especially heinous because defendant committed them for sport and amusement. In addition, the State contended that the killing of the eighteen-year-old Ausley was particularly despicable because defendant had shot him in cold blood as he begged and pleaded for his life. On the other hand, defendant offered much evidence in mitigation of his criminal acts, including the following facts: his youth; the divorce of his parents during his childhood; his chronic drug and alcohol abuse since the age of twelve; his leaving home at the age of thirteen (from that time on, he had lived on his own); his low intelligence; his psychological problems of depression, conflicts in relationships and poor judgment; and his feelings of remorse over the killing of Ausley. In its instructions upon the sentencing phase of the case, the court submitted two aggravating circumstances for the jury's consideration: (1) the murders were especially heinous, atrocious or cruel, G.S. 15A-2000(e)(9); and (2) each murder was part of a course of conduct in which defendant committed a crime of violence against another person, G.S. 15A-2000(e)(11). The court also submitted ten mitigating circumstances to the jury. The jury subsequently found one or more of the mitigating factors but also unanimously found them to be outweighed by the foregoing aggravating circumstances beyond a reasonable doubt. The jury therefore recommended imposition of the death penalty for both murders, and the court so ordered.

Additional facts, which become relevant to defendant's specific assignments of error, shall be incorporated into the opinion.

Atty. Gen. Rufus L. Edmisten by Asst. Atty. Gen. Joan H. Byers, Raleigh, for the State.

Appellate Defender Adam Stein and Ann B. Peterson, Raleigh, pro hac vice for defendant-appellant.

COPELAND, Justice.

Defendant brings forward many assignments of error which he contends require a new trial of these crimes, or a new sentencing hearing, or both. We disagree and affirm the sentences of death imposed upon the jury's recommendations.

At the outset, we must note that defendant's appellate counsel filed a brief which is 109 pages long.[1] A defendant who stands convicted in a capital case is, of course, entitled to effective and diligent advocacy in the presentation of his appeal. However, defendant's brief seems unduly lengthy and quite repetitious. Common sense dictates that there must be an end to what can be said in behalf of any cause and that good judgment and prudence should prevail in the legal art of brief-writing.[2] Indeed, the volume of a brief should always be an accurate reflection of the substance of the arguments presented therein. We therefore exhort practitioners before this Court to seek excellence first, not excessiveness, in the preparation of briefs and remind them that the ability to be direct and concise is a

1. The State was, understandably forced to respond in like kind with a 90 page brief.

2. Our Rules of Appellate Procedure do not set a formal limit upon the length of a brief.

formidable weapon in the arsenal of appellate advocacy. We now direct our attention to the merits of the case and address defendant's arguments in the order in which they appear in his brief.

GUILT PHASE: I—V

I.

Forty-two veniremen were examined over a period of five days before a jury of twelve was impanelled to try this case. During the selection process, the trial court excused eight prospective jurors for cause due to their stated opposition to the death penalty. Defendant contends that the trial court's action deprived him of his constitutional rights of due process and trial by jury. The record plainly refutes this argument.

[1, 2] The applicable constitutional standard permits the excuse of a potential juror for cause if it is established that he "would *automatically* vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case...." *Witherspoon v. Illinois*, 391 U.S. 510, 522 at n. 21, 88 S.Ct. 1770, 1777 at n. 21, 20 L.Ed.2d 776, 785 at n. 21 (1968); *see State v. Cherry*, 298 N.C. 86, 257 S.E.2d 551 (1979), *cert. denied*, 446 U.S. 941, 100 S.Ct. 2165, 64 L.Ed.2d 796 (1980). It is unmistakably clear that seven of the eight potential jurors were properly excused according to this standard after they each stated unequivocally that, even before hearing any evidence in the case, they could not under any circumstances impose the death penalty upon this defendant. *State v. Oliver*, 302 N.C. 28, 39–40, 274 S.E.2d 183, 191 (1981). It is equally clear that the remaining juror, Mary Neal, was also correctly removed from the panel when, after some initial equivocation, she finally stated that she did not "believe" that she could impose the death penalty regardless of the evidence. The court thereupon asked her, "Do I understand that you could not even before you hear the testimony under any circumstances, impose the death penalty?" Ms. Neal replied, "No, I just don't think so." Considering her answers contextually, we find that Ms. Neal expressed a sufficient refusal to follow the law, that of capital punishment, which might become applicable to the case. *State v. Avery*, 299 N.C. 126, 137, 261 S.E.2d 803, 810 (1980); *see State v. Taylor*, 304 N.C. 249, 266, 283 S.E.2d 761, 773 (1981).

[3] The excuse of these jurors for cause did not deprive defendant of his constitutional rights to trial by a jury representing a cross-section of the community or due process of law. *State v. Avery, supra*, 299 N.C. at 137–38, 261 S.E.2d at 810; *State v. Cherry, supra*, 298 N.C. at 106, 257 S.E.2d at 564. We would add, moreover, that the need for their excuse was manifest. It would have amounted to an absurdity and a mockery of our law to have permitted these jurors to sit on a case where imposition of the death penalty was an available sentencing option. For, if capital cases could be tried by juries which included persons *firmly* opposed to the maximum prescribed penalty sought by the State, the separate sentencing hearing mandated by G.S. 15A-2000 would almost certainly become a futile and meaningless exercise, contrary to the expressed will of our citizenry in the enactment of capital punishment legislation.

II.

At trial, defendant contested the premeditation and deliberation elements of first degree murder primarily through the presentation of an intoxication defense. Defendant believes that he was unconstitutionally deprived of the substance of this defense by certain improper comments of the prosecutor and a series of erroneous rulings by the trial court.[3] We are not so persuaded and overrule these assignments of error.

3. This "single" argument in defendant's brief really addresses four distinct issues (howbeit with a common denominator: the intoxication defense). Clarity of review is enhanced by the *separate* statement of each question and its corresponding argument. *See* N.C. Rules of Appellate Procedure, Rule 28(b)(3) [Revised Rule 28(b)(5) (Supp.1981)].

[4-6] (a) In his closing argument to the jury, the district attorney stated, in pertinent part, the following:

> [E]ven if you want to conclude that Michael Pinch was drunk because he said in the statement sometime that he was, he's still guilty because drunkenness is no defense. You have to be so drunk as to be utterly and totally incapable, unable to form the intent to kill and to carry that out; so drunk as to be unable, incapable of understanding the nature and consequence of your act. That is not present here. There is no way you can conclude that anybody was intoxicated to that extent—not on these facts.
>
> . . . .
>
> You can't find it in your conscience and mind, your heart to dignify what happened out there and impartially excuse it on voluntary intoxication. It is not present on this evidence. I suggest to you that there is not even ample evidence to find that he was intoxicated or drunk. . . . No drugs in this case. Beer. Just beer. You just—you can't let him sell that to you. It is not there. It didn't happen. Nobody could have been intoxicated to the extent that the law requires and do what he did in the manner he did it. There just simply—it is offensive to reason and common sense. It stinks to high heaven. (Record at 241, 250).

We can perceive no error in this. Contrary to defendant's assertions, the district attorney correctly conveyed the substance of the law of intoxication to the jury. *See State v. Goodman*, 298 N.C. 1, 12-14, 257 S.E.2d 569, 578-79 (1979). In addition, although some of the foregoing comments were colorful in terminology, we find that as a whole the remarks were compatible with the evidence in the case and that the district attorney was certainly authorized to argue to the jury that the facts did not support a credible defense of intoxication.[4] *See State v. Noell*, 284 N.C. 670, 202 S.E.2d 750 (1974), *death sentence vacated*, 428 U.S. 902, 96 S.Ct. 3203, 49 L.Ed.2d 1205 (1976).

[7] (b) We likewise believe that the trial court's instructions upon the intoxication defense were entirely correct. The record shows that the able judge carefully explained the law in every respect in accordance with the decisions of this Court. *See State v. Propst*, 274 N.C. 62, 161 S.E.2d 560 (1968); N.C.P.I.—Crim. 305.10 (1970). *See also* 4 Strong's N.C. Index 3d, Criminal Law § 6 (1976). We also reject defendant's argument that the judge improperly shifted the burden to defendant to disprove his capacity to form a specific intent to kill after premeditation and deliberation. Viewed as a whole, the judge's charge was not reasonably susceptible of such an erroneous interpretation.

[8, 9] (c) Defendant contends that the trial court erred in denying his pre-trial motion for an order directing the district attorney to make the State's eyewitnesses "available" for interviews with a medical expert who had been appointed to assist in the preparation and evaluation of an intoxication defense. It should be recognized at once that nothing in our statutory discovery provisions would require *the State to compel* its witnesses to submit to any form of interview or questioning by the defense prior to trial; in fact, the State does not even have to afford the defense pre-trial access to a list of its potential witnesses or copies of any statements they may have made. *See* G.S. 15A-903 and 15A-904; *State v. Lake*, 305 N.C. 143, 286 S.E.2d 541 (1982); *State v. Abernathy*, 295 N.C. 147, 244 S.E.2d 373 (1978). Nevertheless, it is true that a prosecutor has an implicit duty not to

4. Under this argument heading in the brief, appellate counsel improperly listed several other exceptions to remarks of the district attorney which were unrelated to the intoxication defense. Such exceptions are not pertinent to the precise question stated. *See* Rule 28(b)(3), *supra*, note 3. Five of these exceptions are argued *again* under assignment of error no. 27 which is reviewed in Part V of the opinion, *infra*. With regard to the remaining "irrelevant" exceptions presented here, it sufficies to say that the comments, which were not objected to at trial, did not transcend the permissible bounds of argument in hotly contested cases and certainly did not amount to gross improprieties in any event. *See State v. Lynch*, 300 N.C. 534, 268 S.E.2d 161 (1980); *State v. Johnson*, 298 N.C. 355, 259 S.E.2d 752 (1979).

obstruct defense attempts to conduct interviews with *any* witnesses; however, a reversal for this kind of professional misconduct is only warranted when it is clearly demonstrated that the prosecutor affirmatively instructed a witness not to cooperate with the defense. *State v. Mason*, 295 N.C. 584, 587–88, 248 S.E.2d 241, 244 (1978), *cert. denied*, 440 U.S. 984, 99 S.Ct. 1797, 60 L.Ed.2d 246 (1979); *State v. Covington*, 290 N.C. 313, 343, 226 S.E.2d 629, 649 (1976).

[10–12] This record contains no such showing. The only indication of *possible* prosecutorial misbehavior is the bare allegation of defense counsel in the motion that the district attorney had told him of his specific refusal to allow the interviews in question. We find nothing in the record to substantiate this claim nor any evidence tending to show that defense counsel actually approached the potential witnesses for the stated purpose only to be rejected on account of the district attorney's prior, direct instructions to them against their cooperation. Defendant has therefore failed to present adequate grounds for reversal. *State v. Mason, supra.* In addition, the bare summary of the proceedings held by the court upon the motion make it plain that the *witnesses themselves* refused to talk with the defense expert *on the advice of their own individual attorneys.* Record at 51. Under these circumstances, neither the State nor the trial court had the power to interfere with the attorney-client privileges of the witnesses or to jeopardize their own future defenses.[5] Viewed in this light, it would have been a vain act indeed for the trial court to order the State to provide the defense with something which was, for all practical purposes, completely unavailable.

[13] In this context, the trial court did all that it could reasonably do by initially providing the defense with $1500 in state funds to hire the medical expert. In denying the motion to compel the interviews, the court reminded the defense that the same necessary information could be obtained if the expert attended the trial and listened to the witnesses' actual testimony.[6] If, as it is suggested, the additional cost of the psychiatrist's time to do just that was prohibitive, defense counsel could have taken notes upon the testimony or relayed a transcript to the doctor for his formulation of an opinion upon the extent of defendant's impairment from intoxication at the time of the killings. We conclude that the denial of the motion did not deprive defendant of effective assistance of counsel or a fair trial. *See also State v. Williams (I)*, 304 N.C. 394, 404–06, 284 S.E.2d 437, 445–46 (1981).

[14, 15] (d) We must now consider whether defendant's constitutional rights of confrontation and due process were unlawfully restricted by the trial court's sustension "of the prosecutor's objections to the defendant's cross-examination of the State's witnesses concerning the amount of beer drunk by the defendant, his level of intoxication and the nature of his behavior...." Defendant's Brief at 30. Our review is governed by the well-established rule that the scope of cross-examination rests largely within the discretion of the trial court, and its rulings thereon will not be disturbed absent a clear showing of abuse or prejudice. *State v. Atkins*, 304 N.C. 582, 585, 284 S.E.2d 296, 298 (1981) (and authorities there cited). Defendant has failed to demonstrate error in the trial court's rulings; consequently, we overrule all of the pertinent underlying exceptions listed in defendant's brief.[7]

5. The witnesses sought by the defense to construct its intoxication theory were the persons who were present during the commission of the murders (and participated in the concealment thereof.)

6. It should perhaps be mentioned that the motion for the "pre-trial" interviews was actually filed after the jury selection process had already begun and only three working days before the full trial of the matter actually commenced. [In fact, the trial court heard and denied the motion on the very first day of the trial.]

7. Exceptions nos. 42, 45 and 50 bear no rational relationship to the argument concerning the "impairment" of the intoxication defense. *See* Rule 28(b)(3), *supra*, note 4. We have nonetheless reviewed these exceptions and find that the prosecutor's objections were properly sustained within the trial court's discretion. Ex-

[16] In several instances, the witnesses actually answered the questions of defense counsel despite the prosecutor's objections and the trial court's sustension thereof (exceptions nos. 27, 28, 48A). The prosecutor did not move to strike the answers, and the trial court did not admonish the jury to disregard them. Thus, defendant effectively received the benefit of the evidence sought after, and he has no corresponding cause for complaint on appeal. *State v. Hopkins*, 296 N.C. 673, 252 S.E.2d 755 (1979).

[17, 18] In another instance, defense counsel attempted to ask an expert medical witness on recross-examination whether the *victims* were legally intoxicated at the time of their deaths (exception no. 35). We believe that this question concerned irrelevant matters which had no logical tendency to prove a fact in issue at defendant's trial for murder. *See* 1 Stansbury's N.C. Evidence § 77, at 234 (Brandis rev. 1973). The relevant issue at trial was whether *defendant* was too intoxicated to form the specific intent to commit murder in the first degree. Obviously, the nature of his criminal acts was not diminished according to the sobriety or drunkenness of the unfortunate victims. Nevertheless, even assuming that this evidence had some degree of relevancy, however slight, it is unquestionably clear that defendant was not prejudiced by its exclusion on *recross*-examination when the doctor had already repeatedly stated during his direct, cross and redirect examinations that the blood alcohol levels of both victims indicated their intoxication at death.

[19, 20] The remaining exceptions argued herein by defendant are equally meritless. Exceptions no. 40 and 41 concerned defense counsel's questioning of the witness Eanes about whether *he* was "influenced by the alcohol [he] had drunk" on the night of the murders. Exception no. 44 related to the overly broad and legally ambiguous question to Eanes about whether he had *ever* seen defendant when he was not "*high*" on drugs or alcohol. Exception no. 48 involved a question as to whether defendant and Billy Wayne Stanley were "drunk" *when* they "mooned" an officer earlier in the evening of the murder (at the trailer). The trial court did not abuse its discretion in sustaining the prosecutor's objections to these questions, and its rulings thereon did not improperly hinder defendant's efforts to present his intoxication defense. None of the questions sought to elicit relevant information having a *direct* bearing upon *defendant's* intoxication impairment *at the time he committed the murders*. Moreover, none of the questions were competently framed to elicit a witness's opinion about defendant's general intoxication based upon the precise legal meaning of that term. *See, e.g., State v. Carroll*, 226 N.C. 237, 239-240, 37 S.E.2d 688, 690-91 (1946).

III.

The jury was advised by both the prosecutor, in his closing argument, and the trial court, in its final instructions, that the elements of malice and unlawfulness were implied in an intentional killing with a deadly weapon. Defendant maintains that his constitutional right to trial by jury was violated because the jury was not also simultaneously informed that it was not compelled to infer malice and unlawfulness, as the presumption of their existence was rebuttable. *See, e.g., State v. Hutchins*, 303 N.C. 321, 346, 279 S.E.2d 788, 804 (1981). Upon this record, defendant's position offends reason and is untenable.

[21, 22] The significant and controlling fact in this case is that defendant, through his trial counsel, *conceded* his guilt of the second degree murders of Pachaco and Aus-

ception no. 42 involved a question which was argumentative and irrelevant. Exceptions nos. 45 and 50 involved questions which sought impermissible conclusions from the witnesses about matters which were not within the realm of their personal knowledge. *See* 1 Stansbury's N.C. Evidence § 122, at 384-85 (Brandis rev. 1973).

ley.[8]. Defense counsel stated in his closing argument to the jury:

> When we started the case in selecting the jury, we told you—and also in opening remarks ... that we were not contesting the fact that this young man over here killed two people intentionally with malice. That's never been at issue in this case. He's guilty of second-degree murder. We've admitted that all along. The State has proved it to you, but they didn't really have to. We admitted that.
>
> ....
>
> ... [W]e're admitting the intentional killing and the malice involved in this thing....
>
> ....
>
> ... He's guilty of second-degree murder, two of them. (Record at 226, 236).

In light of defendant's own affirmative admissions of the existence of malice and unlawfulness in his commission of two "second degree" murders, there could not possibly be any constitutional transgressions or prejudice in the remarks of either the prosecutor or the trial court concerning the presumption of the existence of those very same elements in the charges of first degree murder. "The State is not required to prove malice and unlawfulness unless there is some evidence of their non-existence...." *State v. Simpson*, 303 N.C. 439, 451, 279 S.E.2d 542, 550 (1981); *State v. Hankerson*, 288 N.C. 632, 650, 220 S.E.2d 575, 588 (1975), *rev'd on other grounds*, 432 U.S. 233, 97 S.Ct. 2339, 53 L.Ed.2d 306 (1976). *See also Sandstrom v. Montana*, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979); *State v. White*, 300 N.C. 494, 268 S.E.2d 481 (1980). Moreover, it is evident from the record that the use of the presumption did not alleviate in any manner the State's overall burden of proving the existence of *every* element of first degree murder beyond a reasonable doubt. The assignment of error is overruled.

IV.

Dr. John D. Butts, a forensic pathologist, performed the autopsies of the victims and testified at trial about the causes of their deaths. In the course of his testimony, Dr. Butts identified ten photographs as accurately depicting the appearance of the bodies at the time of his examinations. The State then introduced the photographs as exhibits (over defendant's objections). The trial court instructed the jury that it could consider the exhibits only for limited illustrative purposes, not as substantive evidence of guilt. As the jury viewed each photograph, Dr. Butts again identified its subject and explained the nature of the body's appearance as shown. Defendant argues that the introduction of these gruesome photographs and the repetitive testimony connected therewith effectively deprived him of a fair adjudication of his guilt and a fair sentencing hearing. Defendant believes that, since he "readily admitted that he killed both victims with gunshot wounds," there was no legitimate purpose or need for the use of the photographs and that they only served to inflame the passions of the jury to his decided prejudice. We disagree.

[23–25] The record clearly shows that the photographs were properly introduced according to our rules of evidence. *See State v. Marshall*, 304 N.C. 167, 282 S.E.2d 422 (1981); *State v. Jenkins*, 300 N.C. 578, 268 S.E.2d 458 (1980). The illustrative relevancy of the photographs, which directly corresponded to Dr. Butts' testimony, was not nullified by defendant's "stipulation" as to the cause of the deaths. *See State v. Elkerson*, 304 N.C. 658, 285 S.E.2d 784 (1982). In addition, the actual number of the photographs of the two bodies was not impermissibly excessive under the circumstances of this case. *See State v. Sledge*, 297 N.C. 227, 254 S.E.2d 579 (1979). Finally, the probative force of these depictions of the unattractive markings of the victims' violent deaths (as seen by the medical examiner) was not outweighed by their tendency to repulse the sensibilities, or to arouse the sympathy, of the viewer. *Compare*

8. Defendant only contested his guilt of the more grievous offenses, that of murders in the first degree, with the requisite premeditation and deliberation.

State v. Johnson, 298 N.C. 355, 259 S.E.2d 752 (1979); *State v. Mercer*, 275 N.C. 108, 165 S.E.2d 328 (1969).

V.

[26] Defendant assigns as error the district attorney's numerous references to facts outside the record during his closing argument to the jury during the guilt phase. No objection was interposed at trial to any of the alleged instances of misconduct. Despite trial counsel's laxity, the State's argument in capital cases is subject to limited appellate review for the existence of gross improprieties which make it plain that the trial court abused its discretion in failing to correct the prejudicial matters *ex mero motu*. *State v. Smith*, 294 N.C. 365, 377–78, 241 S.E.2d 674, 681–82 (1978) (and authorities there cited). Considering them contextually and according to the evidence in the case, we hold that the statements challenged here were not extreme or grossly improper.

[27–29] First, there was nothing wrong with the district attorney's remarks about defendant's enjoyment of the killings. Such comments were supported by the evidence and the reasonable inferences therefrom. *See State v. Monk*, 286 N.C. 509, 212 S.E.2d 125 (1975). For example, Billy Wayne Stanley testified that defendant had a grin on his face when he shot the victims, and Officer Fuller testified that defendant had told him that his only regret about the death of Pachaco was that he would not be able to kill him again. Second, the district attorney's statements describing what defendant must have been thinking as he sat quietly behind the bar holding the shotgun were not so prejudicial that the trial court was required to take corrective action even in the absence of an objection. *See State v. King*, 299 N.C. 707, 711–13, 264 S.E.2d 40, 43–44 (1980). Third, and finally, we perceive no gross error in the following "comparisons" made by the State: "You've got to understand the nature of the animal you're dealing with here. I'm not a zoologist, but I don't know of a single living species on this planet that kills for pleasure. Tigers kill to eat, sharks kill to eat. Michael Pinch kills for pleasure. Think about that." Record at 250. This uncomplimentary and disparaging characterization of defendant was entirely warranted by the evidence. *State v. Ruof*, 296 N.C. 623, 252 S.E.2d 720 (1979); *State v. Westbrook*, 279 N.C. 18, 181 S.E.2d 572 (1971), *death sentence vacated*, 408 U.S. 939, 92 S.Ct. 2873, 33 L.Ed.2d 761 (1972).

SENTENCING PHASE: VI–XIX

VI.

[30, 31] Defendant again maintains that the district attorney improperly injected facts outside the record into his jury argument—this time during the sentencing phase of the trial. The scope of argument at the sentencing hearing is governed by the same general rules that apply to argument during the guilt proceedings; consequently, when the remarks challenged on appeal were not objected to at trial, the alleged impropriety must be glaring or grossly egregious for this Court to determine that the trial judge erred in failing to take corrective action *sua sponte*. *See State v. Johnson*, 298 N.C. 355, 368–69, 259 S.E.2d 752, 760–61 (1979). The prosecutorial expressions attacked in this appeal do not fall within the realm of reversible transgressions.

[32] All three of the exceptions set out in the brief under this assignment of error concern the district attorney's statements that the murders were especially despicable, heinous and cruel because defendant executed the victims for sport, recreation and the amusement of his friends. We have already held in part V of the opinion, *supra*, that the evidence in the case reasonably supported a conclusion that defendant enjoyed committing these crimes. That being so, it is clear that the district attorney's further extrapolations at sentencing about the unusually callous and playful nature of defendant's murderous acts were also legitimate under the evidence and were not extreme or prejudicial *per se*.

VII.

Defendant offered much evidence in mitigation of his acts during the penalty phase. In several instances, however, the trial court excluded certain evidence upon the prosecutor's objections. Defendant argues that the trial court thereby deprived him of due process and the right to be free from cruel and unusual punishment.

[33–36] Defendant's contentions must be examined against the backdrop of our capital punishment statute which provides, in conformity with the constitutional mandates of the Eighth and Fourteenth Amendments, that any evidence may be presented at the separate sentencing hearing *which the court deems* "relevant to sentence" or "to have probative value," including matters related to aggravating or mitigating circumstances. G.S. 15A–2000(a)(3); *see Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978). The circumstances of the offense and the defendant's age, character, education, environment, habits, mentality, propensities and criminal record are generally relevant to mitigation; however, the ultimate issue concerning the admissibility of such evidence must still be decided by the presiding trial judge, and his decision is guided by the usual rules which exclude repetitive or unreliable evidence or that lacking an adequate foundation.[9] *See State v. Johnson*, 298 N.C. 355, 367, 259 S.E.2d 752, 760 (1979); *State v. Cherry*, 298 N.C. 86, 98–99, 257 S.E.2d 551, 559 (1979), *cert. denied*, 446 U.S. 941, 100 S.Ct. 2165, 64 L.Ed.2d 796 (1980). *See also State v. Goodman*, 298 N.C. 1, 30–31, 257 S.E.2d 569, 588 (1979). Consequently, we believe that a new sentencing hearing should not be ordered by this Court for the trial judge's exclusion of evidence at the penalty phase unless the defendant demonstrates the existence of patent, prejudicial error. No such showing has been made here.

Specifically, defendant argues that the trial court's sustention of various objections by the prosecutor thwarted his attempts to inform the jury about his "growing awareness of the uselessness of his life up to that point, the pain he caused others, a growing sense of maturity and feelings of remorse and regret." Defendant's Brief at 53. We find that, although some evidence was indeed excluded, the record as a whole is replete with evidence of these matters, and defendant suffered no prejudice whatsoever from the trial court's rulings.

[37, 38] It is true that the trial court sustained an initial and single objection to defendant's testimony about his current feelings of remorse over Pachaco's death; nevertheless, defendant thereafter proceeded to testify in detail about his change in heart and regret without further objection by the prosecutor. Record at 278–79. In addition, Dr. Royal, a forensic psychiatrist, testified about defendant's expressed remorse over Ausley's death. Record at 285. Since substantial evidence of defendant's regrets had already been received, it was not error for the court to exclude (upon objection) further testimony upon the same subject by the witness Sherry Olivey. In any event, defendant later succeeded in introducing more evidence about his repentant statements since the killings through the testimony of his sister and mother. Record at 289, 291–92. We likewise find no reversible error in the trial court's limited admission of defendant's five proffered exhibits consisting of letters he had written to his mother while he was incarcerated pending trial. These letters added little to the *in-court* testimony of defendant and his witnesses about his present awareness of what he had done and his sorrow for it. Even so, the trial court permitted defendant's mother to read to the jury all of exhibit five and portions of exhibits three

9. This does not mean that the evidentiary rules which normally apply at the guilt phase of the trial should also apply with *equal force* in the sentencing phase. Evidentiary flexibility is encouraged in the serious and individualized process of life or death sentencing. *See Williams v. New York*, 337 U.S. 241, 69 S.Ct. 1079, 93 L.Ed. 1337 (1949). However, as in any proceeding, evidence offered at sentencing must be pertinent and dependable, and, if it passes this test in the first instance, it should not ordinarily be excluded. G.S. 15A–2000(a)(3), *supra; see Green v. Georgia*, 442 U.S. 95, 99 S.Ct. 2150, 60 L.Ed.2d 738 (1979).

and four in which defendant had essentially stated, both in prose and poem, that it hurt him to know that he was capable of taking another's life, that he was living for the future and cleaning up his act, and that he had a mature and sincere desire to fulfill his part in life and society properly. Record at 297–99. The letters totally excluded by the court, exhibits one and two, merely repeated the same things, howbeit using different words or examples, about his remorse and his wish to be a better person. Moreover, these two letters included much material which plainly was not relevant to sentencing, *i.e.*, his apologies to his mother for not having been a better son to her despite her good efforts and his rambling philosophical questionings about why he had turned out to be so bad.

[39] Defendant also maintains that the trial court erred in not permitting Sherry Olivey to testify about *the circumstances of his various hospitalizations* for drug overdoses. We disagree. Ms. Olivey testified that she knew of occasions where defendant had taken a drug overdose and that she had visited him in Cone Memorial Hospital three months after the crimes. Certainly, defendant's *habits* regarding alcohol and drug misuse were relevant mitigating factors for the jury's consideration; however, the precise details of his particular overdoses were not pertinent to his sentencing. It was enough that the jury was informed by Ms. Olivey that:

> I can honestly say that he [defendant] drank or took something every day that I've known him [two years]. . . . He always went to the max on everything to where he couldn't walk anymore or was passed out. I have seen him when he has gone too far in the use of alcohol or the use of drugs. I have seen him take alcohol or drugs to the point where he is unconscious or in some state like that. Record at 286–87.

[40–42] Defendant finally challenges the trial court's refusal to admit certain expert testimony. These contentions lack merit. The court correctly sustained the prosecutor's objection to defense counsel's attempt to elicit an opinion from a psychiatrist about whether defendant "would be able to adjust to life in prison." Such an opinion would have concerned a matter totally irrelevant to sentencing. Defendant stood convicted of two first degree murders. *Regardless* of his ability to adjust to prison life, by law, defendant was already subject to the mandatory imposition of life imprisonment for those crimes. *See* G.S. 14–17; G.S. 15A–2000(a)(1), 15A–2002. The issue to be determined by the jury at the penalty phase was not whether defendant would prove to be a "good" prisoner but whether the overall nature of the murders and defendant's attendant acts warranted imposition of the *maximum* available penalty—death in the gas chamber.[10] The trial court also properly excluded the opinion of another psychiatrist about defendant's blood alcohol levels at the time of the shootings. Clearly, such evidence would have been relevant; however, as the doctor plainly admitted that he could not render an opinion within a reasonable degree of medical certainty, the evidence was unreliable and lacked probative value.

In sum, defendant is not entitled to a new sentencing hearing upon the ground that the foregoing classes of evidence were erroneously restricted or rejected by the trial court.

VIII.

At the penalty phase, defendant testified that he had been drinking alcohol and taking or injecting all kinds of illicit drugs

[10] Even assuming that defendant's ability to cope in prison had some slight relevancy to his sentencing, we would still hold that the psychiatrist's opinion was properly excluded because there was an insufficient foundation in the record for a conclusion that he was better qualified to have an opinion on this subject than the jury. There was no evidence specifying the doctor's special experience with the prison environment, and the question posed to him essentially requested nothing more than his speculations about defendant's future prison "performance" based merely upon his observations of defendant's behavior in a mental hospital for three and a half weeks.

since he was fourteen years old. He also stated that he had been consuming approximately twelve beers a day for the three years preceding the murders. Obviously, this testimony tended to bolster defendant's evidence of mitigating circumstances. The prosecutor responded by cross-examining defendant about where he got the money to buy all the beer and drugs which he said he had taken every day for five years. Defendant answered that he had money even though he had not been employed. The prosecutor repeatedly asked defendant to identify the specific source of that money, but defendant only replied, "I just got it." The prosecutor finally asked him, "Who did you steal from?" The trial court sustained defense counsel's immediate objection to the question. Defendant complains that the prosecutor's persistent questioning about the money improperly suggested to the jury that he must have committed other criminal offenses to support his habits. On the whole, we find no prejudicial error.

[43, 44] As a general matter, the truthfulness of any aspect of any witness's testimony may be attacked on cross-examination. *See* 1 Stansbury's N.C. Evidence §§ 39–40 (Brandis rev. 1973). This basic rule applies to all trial proceedings, including both the guilt and sentencing phases in capital cases. Thus, it is clear that the prosecutor could properly attempt to impeach defendant's testimony about the actual *extent* of his destructive habits. Defendant's ability to afford the necessary items certainly bore upon the credibility of his self-serving statements about their constant use.

[45, 46] In addition, the persistent nature of the prosecutor's questioning was not abusive in light of defendant's evasive and unresponsive answers. The scope and fairness of the cross-examination was a matter left to the sole discretion of the trial judge, and the prosecutor had a right to sift or press defendant in order to get a direct and clear response. *See State v. Williams*, 303 N.C. 142, 147, 277 S.E.2d 434, 438 (1981); *State v. Currie*, 293 N.C. 523, 529, 238 S.E.2d 477, 481 (1977).

[47] On the other hand, however, it seems that defendant's objection to the prosecutor's inferential inquiry about the stealing was well taken. The question amounted to a speculative insinuation of prior criminal conduct with no ascertainable good faith *factual* basis. See *State v. Shane*, 304 N.C. 643, 651, 285 S.E.2d 813, 818 n. 3 (1982). Still, it was a *single* impropriety, and this case is, therefore, markedly different from *State v. Phillips*, 240 N.C. 516, 82 S.E.2d 762 (1954), where the prosecutor cross-examined the defendant in detail about *seventeen* unproved accusations of prior misconduct. Thus, we hold that the trial court's prompt sustension of defendant's objection to the disapproved question sufficiently averted any prejudice to defendant. *See State v. Williams, supra*, 303 N.C. at 147, 277 S.E.2d at 438.

IX.

Defendant assigns further error to the district attorney's jury argument during the sentencing phase. We have already overruled several of the same supporting exceptions in part VI of the opinion, *supra*, where we set forth the controlling standard of review of any jury argument which is not objected to at trial. To avoid redundancy, we shall not plow those rows again, instead, we shall limit our review to a consideration of the *additional* exceptions presented here.[11]

[48, 49] Let us begin by saying that prosecutorial statements are not placed in an isolated vacuum on appeal. Fair consideration must be given to the context in which the remarks were made and to the overall factual circumstances to which they referred. Moreover, it must be remembered that the prosecutor of a capital case has a duty to pursue ardently the goal of persuading the jury that the facts in evi-

11. We are compelled to question appellate counsel's organizational rationale for raising further challenges to the sentencing argument here when, logically, all contentions of this type should have been argued together in the same portion of the brief.

dence warrant imposition of the ultimate penalty. G.S. 15A-2000(a)(4); *State v. Myers*, 299 N.C. 671, 680, 263 S.E.2d 768, 774 (1980); *State v. Johnson*, 298 N.C. 355, 367, 259 S.E.2d 752, 760 (1979); *State v. Westbrook*, 279 N.C. 18, 37, 181 S.E.2d 572, 583 (1971), *death sentence vacated*, 408 U.S. 939, 92 S.Ct. 2873, 33 L.Ed.2d 761 (1972).

[50-54] In this case, it is evident that the district attorney argued for capital punishment of defendant's murder convictions with much vim and vigor. Record at 306-10. Contrary to defendant's assertions, however, we do not believe that the district attorney's zeal caused him to overstep the bounds of permissible argument. Examining his statements in their complete context, we are convinced that he did not say anything which would amount to a gross impropriety. His comment that defendant was "not Jack the Ripper yet" was tempered by the prior explanation to the jury that it could consider any facts or circumstances which it deemed to have mitigating value, including defendant's admitted lack of significant criminal history. The district attorney's expressions concerning his belief in the death penalty and the propriety of its imposition in the case must be weighed with his frequent reminders to the jury that *it* would have to determine what the appropriate punishment should be.[12] *Compare State v. Smith*, 279 N.C. 163, 181 S.E.2d 458 (1971). The characterization of defendant's mind as a "cesspool" cannot be deemed unfair in light of defendant's own admissions that he killed the victims intentionally and maliciously simply because Pachaco had wrongfully worn the insignia or emblem of a motorcycle gang sometime in the past. The statement to the jury that it would not have hesitated to give defendant his "just reward" right there on the spot if it had actually witnessed the murders, although disapproved by us, was not an inflammatory invitation for the jury to act like a lynch mob. The district attorney noted that the law did not work that way. His comment was a colorful attempt to emphasize the cruelty and callousness with which defendant killed the victims. Finally, there was nothing inherently prejudicial in the district attorney's complaints about how he could not bring in family members to testify about the "trials and travails" of *Pachaco's* life, in contrast to all of the evidence about defendant's family and personal history received in mitigation. The district attorney was merely reminding the jury that, although it did not know much about him, it should also carefully consider the value of the victim's life in making its life or death decision about defendant.

12. For example, the district attorney stated:

> I don't know what you will conclude is appropriate. I suggest to you, with all due respect, that the conduct is appropriate to be rewarded with the ultimate sanction that our law provides.
>
> We're all people of great ability and conscience, and I ask you to consider what is appropriate for this act. Consider what is justice for Michael Pinch and for what he did. Consider the two dead boys that he left in his wake.

X.—XI.

Defendant tendered in writing the following ten circumstances in mitigation:

1. The defendant has no significant history of prior criminal activity.

2. The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired.

3. The age of the defendant at the time of the crime.

4. The defendant voluntarily admitted his culpability immediately after his arrest and cooperated with police efforts to clarify the evidence in these cases and other pending cases arising out of the incident.

5. The defendant since his incarceration has appreciated the severity and error of his conduct.

6. The defendant since his incarceration has ceased the use of alcohol and drugs and is able to function with more maturity and responsibility.

7. The defendant lacks education and has a relatively low mentality.

8. The environment in which the defendant lived until the time of his arrest was infused with violence and accepted violence as an [sic] problem-solving technique.

9. The defendant's childhood history, background, and record shows no indication of a habitually violent nature.

10. Any other circumstances or circumstances arising from the evidence which you, the jury deem to have mitigating value. Record at 275.

With the exception of the last portion of number seven regarding defendant's "relatively low mentality," the trial court honored defendant's request and submitted all ten of these mitigating factors to the jury. Defendant argues that the trial court thereby erred in two ways: (1) in failing to submit his low mentality in mitigation as requested and (2) in failing to submit upon its own motion the additional statutory mitigating circumstance of G.S. 15A-2000(f)(2), *i.e.*, that he committed the murders while he was "under the influence of mental or emotional disturbance." We conclude that defendant's contentions cannot be sustained on this record.

This Court has previously established instructive guidelines for the trial judges of our State to follow in the submission of mitigating circumstances, including those which arise upon the evidence in a given capital case as well as those specified in G.S. 15A-2000(f). First, in *State v. Goodman*, we held that, although the jury's consideration of any factor relevant to the circumstances of the crime or the character of the defendant may not be restricted, the trial court "is not required to sift through the evidence and search out every possible circumstance which the jury might find to have mitigating value," especially when the trial court instructs the jury upon the open-ended provision of G.S. 15A-2000(f)(9) and thus does not hinder it from evaluating on its own *anything* of mitigating value. 298 N.C. 1, 33-34, 257 S.E. 569, 589-90 (1979). Second, in *State v. Johnson*, we held that the trial court must include additional factors, which are timely requested by the defendant, on the written list submitted to the jury *if* they are "supported by the evidence, and . . . are such that the jury could *reasonably* deem them to have mitigating value. . . ." 298 N.C. 47, 72-74, 257 S.E.2d 597, 616-17 (1979) (emphasis added). Third, in *State v. Hutchins*, we held that, although the trial court has a fundamental duty to declare and explain the law arising upon the evidence, it is not required to instruct upon a *statutory* mitigating circumstance *sua sponte* unless defendant, who has the burden of persuasion, brings forward sufficient evidence of the existence of the specified factor. 303 N.C. 321, 355-56, 279 S.E. 788, 809 (1981); *see State v. Taylor*, 304 N.C. 249, 277, 283 S.E.2d 761, 779 (1981).

[55, 56] The rules of the foregoing cases are sound and practical, and we therefore exhort our trial judges to adhere to them carefully when presiding over the trial of capital cases. Moreover, we must also point out that common sense, fundamental fairness and judicial economy dictate that any reasonable doubt concerning the submission of a statutory or requested mitigating factor be resolved in the defendant's favor to ensure the accomplishment of complete justice at the *first* sentencing hearing. Nevertheless, the same standard of appellate review continues to apply whether the trial court commits error at the guilt phase or the penalty phase; thus, a new sentencing hearing will *not* be ordered for the erroneous failure to submit a mitigating circumstance if that error was *harmless beyond a reasonable doubt*. G.S. 15A-1443(b); *see State v. Williams (I)*, 304 N.C. 394, 425-26, 284 S.E.2d 437, 456-57 (1981) (erroneous submission of aggravating circumstance was prejudicial and required new sentencing hearing); *State v. Taylor*, *supra*, 304 N.C. at 285-88, 283 S.E.2d at 783-85 (erroneous submission of aggravating circumstance was not prejudicial).

[57] The sum of the matter is this—a defendant demonstrates reversible error in the trial court's omission or restriction of a statutory or timely requested mitigating circumstance in a capital case only if he affirmatively establishes three things: (1)

that the particular factor was one which the jury could have reasonably deemed to have mitigating value (this is presumed to be so when the factor is listed in G.S. 15A-2000(f)); (2) that there was sufficient evidence of the existence of the factor; and (3) that, considering the case as a whole, the exclusion of the factor from the jury's consideration resulted in ascertainable prejudice to the defendant. The defendant in the instant case fails this three-prong test for a new sentencing hearing.

[58-60] We first analyze defendant's request for an instruction upon his "relatively low mentality." This factor is not listed in G.S. 15A-2000(f); however, our cases plainly indicate that the mentality of a defendant is generally relevant to sentencing and that it can, with supporting evidence, be properly considered in mitigation of a capital felony. *See State v. Johnson*, 298 N.C. 355, 367, 259 S.E.2d 752, 760 (1979), and part VII of the opinion, *supra*. In this case, a psychiatrist testified that defendant had scored 66 on an intelligence test. This fact unquestionably related to defendant's mentality, and we believe that defendant would have been entitled to an instruction about his specific intelligence quotient *if* he had tendered a properly worded request therefor. *See, e.g., State v. Williams*, 304 N.C. 394, 401, 284 S.E.2d 437, 443 (1981); *State v. Rook*, 304 N.C. 201, 211 n. 1, 283 S.E.2d 732, 739 (1981), *cert. denied*, — U.S. —, 102 S.Ct. 1741, 72 L.Ed.2d 155 (1982). However, we do not believe that defendant's evidence adequately authorized the submission of the instruction he did request which used the terms "relatively low mentality." In this regard, the psychiatrist testified that defendant's "other tests indicated that his I.Q. was probably a little higher than [66] and fell at least into the *low-normal range of intelligence*." Although we are not schooled in the medical art of psychiatry, we think that one would not commonly understand low to normal intelligence to be reasonably synonymous with relatively low mentality. Consequently, we hold that the trial court did not err in refusing to instruct the jury in this respect. In any event, the omission could not have possibly been prejudicial since the trial court told the jury it could evaluate "[a]ny other circumstances or circumstances arising from the evidence which you, the jury deem to have mitigating value." G.S. 15A-2000(f)(9).

[61, 62] For similar reasons, we reject defendant's contention that the trial court erred in not instructing upon a statutory mitigating circumstance *sua sponte*. The evidence simply did not support the submission of G.S. 15A-2000(f)(2). The psychiatrist testified that defendant had "psychological problems" and was "a very passive person that exhibits *some* chronic depression in terms of how he functions in life." He also stated that defendant was "not basically a violent person" and that there was no evidence "that he was an angry acting out type person that you ordinarily find in people that are prone to violence." On cross-examination, the psychiatrist further explained the results of his examination of defendant as follows:

> I also found no evidence of any thought disorder. I found his memory to be adequate and his perception to be adequate. I found that he was always oriented as the time, place and person. I would classify his depression as *mild* depression. I believe that part of his depression would be caused by the incarceration and facing two charges of murder in the first degree. I did not find any evidence of the type of anger that you normally find in people of these subculture groups.

Record at 283-86 (emphasis added). This evidence did not, in our opinion, sufficiently show that defendant was somehow *under the influence* of a mental or emotional disorder *at the time* he committed the murders. We also have serious doubts as to whether "some" "mild" "chronic depression" qualifies as a bona fide mental or emotional disturbance under our capital punishment statute. *Compare State v. Taylor*, *supra* (evidence that defendant had "paranoid psychosis"); *State v. Rook*, *supra* (psychiatrists gave direct opinions that defendant had a mental disorder or illness); *State v. Johnson*, *supra* (defendant was di-

agnosed as schizophrenic). Again, even assuming that the trial court should have instructed upon G.S. 15A–2000(f)(2), its failure to do so did not constitute prejudicial error since the jury could have elected to consider this factor pursuant to the trial court's instruction upon G.S. 15A–2000(f)(9).

XII.

The trial court submitted each of the two killings as an aggravating circumstance for the other under the "course of conduct" provision of G.S. 15A–2000(e)(11).[13] Defendant argues that this kind of reciprocal aggravation to enhance his punishment for both crimes constituted double jeopardy and deprived him of due process of law.[14] For a precise understanding of the issue raised by defendant, we quote from his brief as follows:

> In summary, the defendant's claim in this case ... is that the prosecution faced with two homicides committed by the same person in the same "course of conduct" must choose between two options. The prosecution may use one of the homicides as an aggravating circumstance under § 15A–2000(e)(11) to support the increased penalty of death for the other. The prosecution may seek a separate conviction for each of the homicides, in which case a death penalty for either must be based on aggravating factors that do not include the other homicide. The double jeopardy clause prohibits the prosecution from using both options, i.e., from obtaining a substantive conviction for a homicide and then using it again as an aggravating circumstance under § 15A–2000(e)(11) to support punishment by death for the other killing. Defendant's Supplemental Brief at 4.

13. G.S. 15A–2000(e)(11) lists the following factor for the jury's consideration: "The murder for which the defendant stands convicted was part of a course of conduct in which the defendant engaged and which included the commission by the defendant of other crimes of violence against another person or persons."

14. Defendant's motion to file a supplemental brief on this question was allowed by the Court on 8 March 1982. We shall address defendant's contentions as they are presented in that amplified brief.

To the contrary, we find no constitutional authority mandating a conclusion by us that the submission of G.S. 15A–2000(e)(11) in aggravation of both murders violated defendant's protection against double jeopardy, and we decline to adopt a position which would prevent the administration and availability of equal justice for equal crimes.[15]

[63] In the instant case, defendant killed two persons at the same place and within minutes of each other. The capital charges were tried together pursuant to defendant's own motion for joinder. The jury found defendant guilty of murder in the first degree, upon the theory of premeditation and deliberation, on both counts. The State was thereupon entitled to seek the death penalty for each murder, and it properly did so. The State sought the death penalty based upon the aggravating circumstances of *both* G.S. 15A–2000(e)(9) and (11). The jury found that these aggravating circumstances outweighed the mitigating beyond a reasonable doubt and recommended the death penalty in each case. There was no constitutional error in the procedure employed.

[64] The cases principally relied upon by defendant are clearly inapposite, and the reasoning of those cases simply cannot be stretched to encompass the imaginative and innovative standard of double jeopardy which defendant seeks to impose at *the initial sentencing hearing jointly held upon dual capital convictions.* For example, both the United States Supreme Court's decision in *Bullington v. Missouri*, 451 U.S. 430, 101 S.Ct. 1852, 68 L.Ed.2d 270 (1981), and the decision of this Court in *State v. Silhan*, 302

15. We reach the same conclusion in another death penalty case filed by our Court today: *State v. Williams (II)*, — N.C. —, 292 S.E.2d 243 (1982). In *Williams (II)*, the defendant was tried separately in two counties for two murders. Each murder was submitted as reciprocal aggravation for the other under G.S. 15A–2000(e)(11) at defendant's separate trials. *See State v. Williams (I)*, 304 N.C. 394, 284 S.E.2d 437 (1981).

N.C. 223, 275 S.E.2d 450 (1981), addressed the double jeopardy implications which arise in the event a new trial or a new sentencing hearing is required in a capital case after the jury has already decided the punishment issue either for or against the defendant. Such is plainly not the situation here, and we need not search out hidden nuances of the double jeopardy clause in order to decide the case before us. It is sufficient to recognize that the thrust of the concept of double jeopardy is that a defendant may not be unfairly subjected to multiple prosecutorial attempts to obtain a conviction or a certain penalty for the same offense nor may a defendant receive multiple punishment for the same offense. *See Bullington v. Missouri, supra; State v. Silhan, supra.*

[65] Regardless of the formula utilized, the jury's *consideration* of a defendant's commission of "other crimes of violence," in making its ultimate penalty recommendation for that defendant's conviction of a related but separate capital offense, is not logically equivalent to the defendant receiving multiple punishment for the same crime. This is especially true where, as here, the prosecution relies on an additional aggravating circumstance which is also subsequently found by the jury. In short, the principle of double jeopardy has not evolved, as defendant argues, to the point that it prevents the prosecution from relying, at the sentencing phase of a capital case, upon a related course of criminal conduct by the defendant as an aggravating factor to enhance the punishment of defendant for another distinct offense, and this is so, irrespective of whether the defendant was also convicted of another capital charge arising out of that very same course of criminal conduct and subjected to separate punishment therefor. *See, e.g., State v. Hutchins*, 303 N.C. 321, 347, 279 S.E.2d 788, 804 (1981) (reciprocal aggravation of two first-degree murders under G.S. 15A-2000(e)(11)). *See also State v. Cherry*, 298 N.C. 86, 113, 257 S.E.2d 551, 568 (1979), *cert. denied*, 446 U.S. 941, 100 S.Ct. 2165, 64 L.Ed.2d 796 (1980) (discussing the use of an underlying felony, which accompanies the commission of a premeditated murder, as an aggravating circumstance under G.S. 15A-2000(e)(5)).

In conclusion, we hold that the enhancement of defendant's penalty on the one hand for Pachaco's murder did not result in an unconstitutional duplication of defendant's penalty on the other hand for Ausley's death, and vice versa, simply because defendant's overall violent conduct was submitted in aggravation on each hand under G.S. 15A-2000(e)(11). It is the very fact that defendant killed two people, and not just one, that aggravates the nature of his crimes, and it was entirely proper for the jury to consider this fact in determining whether defendant should pay the ultimate price for *each* life he took.

XIII.

[66] Defendant assigns error to the trial court's direction to the jury that it need not specify which mitigating circumstances on the written list it found. This same issue was recently addressed at length in *State v. Rook*, where we stated: "While defendant makes a good argument that it is the better practice, and we agree, to require the jury to specify mitigating factors found and not found for the benefit of this Court in reviewing the appropriateness of the death penalty, we find no such requirement in our statutes." 304 N.C. 201, 231, 283 S.E.2d 732, 751 (1981), *cert. denied*, — U.S. —, 102 S.Ct. 1741, 72 L.Ed.2d 155 (1982). Moreover, in *State v. Taylor*, we also found "no merit in defendant's contention that since the jury had to answer each aggravating circumstance specifically but did not have to answer which mitigating circumstances they found, that placed undue emphasis on the aggravating circumstances." 304 N.C. 249, 285, 283 S.E.2d 761, 783 (1981). It suffices to say that defendant's similar contentions must be overruled pursuant to the binding authority of both *Rook* and *Taylor*.

XIV.

Both the prosecutor and the trial court advised the jury that it had a *duty* to

recommend a sentence of death if it found three things: (1) that one or more statutory aggravating circumstances existed; (2) that the aggravating circumstances were substantial enough to warrant the death penalty; and (3) that the aggravating circumstances outweighed the mitigating circumstances beyond a reasonable doubt. On the other hand, the jury was also advised that it had the duty to recommend a sentence of life imprisonment if it did not find any one of those three things. These directions to the jury were based upon the statutory criteria set forth in G.S. 15A-2000(b) and (c) and conformed to the N.C. Criminal Pattern Jury Instructions § 150.10 (1980).[16]

Nevertheless, defendant assigns error to the foregoing on the basis that such instructions "prejudicially withdrew from the jury its final option ... to recommend a life sentence notwithstanding its earlier findings." Defendant's Brief at 75. This assignment lacks merit.

[67, 68] The jury had no such option to exercise unbridled discretion and return a sentencing verdict wholly inconsistent with the findings it made pursuant to G.S. 15A-2000(c). The jury may not arbitrarily or capriciously *impose or reject* a sentence of death. Instead, the jury may only exercise guided discretion *in making the underlying findings* required for a recommendation of the death penalty within the "carefully defined set of statutory criteria that allow them to take into account the nature of the crime and the character of the accused." *State v. Johnson*, 298 N.C. 47, 63, 257 S.E.2d 597, 610 (1979); *see State v. Barfield*, 298 N.C. 306, 349-52, 259 S.E.2d 510, 541-43 (1979), *cert. denied*, 448 U.S. 907, 100 S.Ct. 3050, 65 L.Ed.2d 1137 (1980). Moreover, defendant's contention was implicitly answered in *State v. Goodman*, 298 N.C. 1, 257 S.E.2d 569 (1979), in which this Court overruled an assignment of error alleging that the trial court had erred in failing to instruct the jury that it could still recommend life imprisonment even though it found that the aggravating circumstances outweighed the mitigating ones. Justice Britt, speaking for the Court in *Goodman*, explained that:

> [I]t would be improper to instruct the jury that they may, as defendant suggests, disregard the procedure outlined by the legislature and impose the sanction of death at their own whim. To do so would be to revert to a system pervaded by arbitrariness and caprice. The exercise of such unbridled discretion by the jury under the court's instruction would be contrary to the rules of *Furman* [*v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346] and the cases which have followed it.

Id. at 35, 257 S.E.2d at 590. For these reasons, we hold that the jury was correctly informed that it had a duty to recommend a sentence of death if it made the three findings necessary to support such a sentence under G.S. 15A-2000(c).[17]

XV.

The trial court instructed the jury upon the statutory aggravating circumstance of G.S. 15A-2000(e)(9), that the murders were "especially heinous, atrocious, or cruel." Defendant essentially contends that the evidence did not support the existence of this factor and that the trial court's instruction upon it thus violated the Eighth Amendment.

[69] In accordance with the dictates of the Eighth Amendment, our Court has ad-

16. Similar instructions about the jury's duty to return a certain sentencing verdict, based upon its affirmative findings under G.S. 15A-2000(c), were given in three other death cases previously decided by our Court, in which no corresponding exception or assignment of error was raised on appeal: *State v. Barfield*, 298 N.C. 306, 259 S.E.2d 510 (1979), *cert. denied*, 448 U.S. 907, 100 S.Ct. 3050, 65 L.Ed.2d 1137 (1980); *State v. Martin*, 303 N.C. 246, 278 S.E.2d 214, *cert. denied*, —— U.S. ——, 102 S.Ct. 431, 70 L.Ed.2d 240 (1981); and *State v. Rook*, 304 N.C. 201, 283 S.E.2d 732 (1981), *cert. denied*, —— U.S. ——, 102 S.Ct. 1741, 72 L.Ed.2d 155 (1982).

17. There is no constitutional infirmity in such an instruction. *See, e.g. Jurek v. Texas*, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976) (cited in the dissent).

hered to the position that the aggravating circumstance of G.S. 15A–2000(e)(9) "does not arise in cases in which death was immediate and in which there was no unusual infliction of suffering upon the victim." *State v. Rook*, 304 N.C. 201, 226, 283 S.E.2d 732, 747 (1981), *cert. denied*, —— U.S. ——, 102 S.Ct. 1741, 72 L.Ed.2d 155 (1982); *see Godfrey v. Georgia*, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980); *see, e.g., State v. Hamlette*, 302 N.C. 490, 504, 276 S.E.2d 338, 347 (1981) (submission of G.S. 15A–2000(e)(9) was erroneous). Instead, our Court has made it clear that the submission of G.S. 15A–2000(e)(9) is appropriate only when there is evidence of excessive brutality, beyond that normally present in any killing, or when the facts as a whole portray the commission of a crime which was conscienceless, pitiless or unnecessarily tortuous to the victim. *State v. Goodman*, 298 N.C. 1, 257 S.E.2d 569 (1979); *see, e.g., State v. Martin*, 303 N.C. 246, 278 S.E.2d 214, *cert. denied*, —— U.S. ——, 102 S.Ct. 431, 70 L.Ed.2d 240 (1981); *State v. Oliver*, 302 N.C. 28, 274 S.E.2d 183 (1981). It is, therefore, plain that an issue concerning the propriety of the submission of this aggravating factor is resolved according to the peculiar surrounding facts of the capital case under consideration.

[70] Examining the case at bar, we hold that there was sufficient evidence whereby the jury could have reasonably concluded that the murders of Pachaco and Ausley were especially despicable and wanton under G.S. 15A–2000(e)(9). The evidence showed that defendant carefully executed a deliberate and premeditated plan for murder. We have already set out the details of the murders at length in the beginning of the opinion, and it would be repetitious to summarize them again here. It suffices to say that the deaths of the unsuspecting victims were not instantaneous and that both killings involved the infliction of unusual physical or psychological torture. Each victim essentially witnessed (or heard) the shooting of the other and was helpless to prevent this unprovoked horror. The killing of Pachaco was excessively brutal in that defendant, having already shot him once, walked over to where he lay moaning on the floor and shot him again at point blank range. The killing of Ausley was merciless and conscienceless in that defendant shot him as he begged and pleaded for his life. Defendant seemed to enjoy the killings, and he showed no remorse for what he had done at that time. In fact, defendant callously evaluated his conduct in his subsequent announcement to his companions that he had "just blown away two dudes." Viewing the circumstances of the murders as a whole, we hold that the trial court correctly instructed the jury upon G.S. 15A–2000(e)(9).

XVI.

The sentence of death in a given case cannot be "excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." G.S. 15A–2000(d)(2). Defendant argues that the infliction of the death penalty for these murders would be excessive and disproportionate punishment. We disagree. All things considered, we cannot say, *as a matter of law*, that this defendant is somehow less deserving of capital punishment than the other occupants of death row. *See, e.g., State v. Taylor*, 304 N.C. 249, 283 S.E.2d 761 (1981); *State v. Rook*, 304 N.C. 201, 283 S.E.2d 732 (1981), *cert. denied*, —— U.S. ——, 102 S.Ct. 1741, 72 L.Ed.2d 155 (1982); *State v. Hutchins*, 303 N.C. 321, 279 S.E.2d 788 (1981); *State v. Martin*, 303 N.C. 246, 278 S.E.2d 214, *cert. denied*, —— U.S. ——, 102 S.Ct. 431, 70 L.Ed.2d 240 (1981); *State v. McDowell*, 301 N.C. 279, 271 S.E.2d 286 (1980), *cert. denied*, 450 U.S. 1025, 101 S.Ct. 1731, 68 L.Ed.2d 220 (1981); *State v. Barfield*, 298 N.C. 306, 259 S.E.2d 510 (1979), *cert. denied*, 448 U.S. 907, 100 S.Ct. 3050, 65 L.Ed.2d 1137 (1980). The facts of the instant case speak for themselves and we shall not disturb the factual findings made by the jury under G.S. 15A–2000(c) in reaching its recommendations for the death penalty in this case.

[71, 72] Within this argument, defendant also urged this Court to adopt several

procedures to assist appellate review of the proportionality of the death sentence in a particular case. It would serve no useful purpose to address each suggestion here. Instead, we believe that all of the matters raised by defendant are adequately answered by our two-fold determination that: (1) the review mandated by G.S. 15A-2000(d)(2) (*supra*) provides a sufficient constitutional safeguard against the unconstitutional imposition of cruel and unusual punishment, and (2) the intended *ultimate* emphasis of proportionality review under G.S. 15A-2000(d)(2) is upon the independent consideration of the individual defendant and the nature of the crime or crimes which he has committed.

XVII.—XIX.

[73-75] The final three "arguments" presented by defendant's appellate counsel ask us to re-examine the constitutional validity of several prior cases without advancing a single good, logical or compelling reason for doing so. Such spurious disputations lack merit, do not warrant discussion and are not well received. Even so, we shall take this opportunity to reaffirm today the constitutionality of the following aspects of our capital sentencing procedure: (1) the bifurcated trial proceedings of G.S. 15A-2000, in which the same jury determines both the guilt and punishment issues, and the use of challenges for cause to excuse therefrom prospective jurors who are unequivocally opposed to the death penalty; (2) the submission of the sufficiently clear statutory aggravating circumstance of G.S. 15A-2000(e)(9), that the capital felony is "especially heinous, atrocious, or cruel," in appropriate cases; and (3) the placement of the burden upon the defendant of persuading the jury, by a preponderance of the evidence, that a particular mitigating circumstance exists. *State v. Rook*, 304 N.C. 201, 283 S.E.2d 732 (1981), *cert. denied*, —— U.S. ——, 102 S.Ct. 1741, 72 L.Ed.2d 155 (1982); *State v. Avery*, 299 N.C. 126, 261 S.E.2d 803 (1980) (and cases cited in part I of the opinion, *supra*); *State v. Barfield*, 298 N.C. 306, 259 S.E.2d 510 (1979), *cert. denied*, 448 U.S. 907, 100 S.Ct. 3050, 65 L.Ed.2d 1137 (1980); *State v. Johnson*, 298 N.C. 47, 257 S.E.2d 597 (1979); *State v. Goodman*, 298 N.C. 1, 257 S.E.2d 569 (1979).

XX.

The decision to take a life pursuant to the law, for the life of another, or others, wrongfully taken, is a very grave and solemn matter. Thus, this Court accords the utmost diligence and care in its review of capital cases. In the instant case, we have fully considered all of the arguments in defendant's brief, which encompassed the multitudinous assignments of error and exceptions in the record on appeal. We are convinced that both phases of defendant's trial were competently conducted without the accompaniment of constitutional defect or prejudicial error, and we so hold.

We also hold that the judgments of death were lawfully imposed. The evidence supported submission of the aggravating circumstances listed in G.S. 15A-2000(e)(9) and (11). There is no indication that the jury recommended capital punishment under the influence of passion or prejudice. Finally, the penalties imposed do not seem excessive or disproportionate considering the premeditated and callous manner in which defendant calmly shot and killed two people in cold blood, suddenly and without any provocation by them, for reasons exhibiting a wanton disregard for human life. Indeed, the record impels the conclusion that justice has been done in every respect. In sum, we have no authority or cause to disturb the duly entered judgments of death.

NO ERROR.

MITCHELL, J., did not participate in the consideration or decision of this case.

CARLTON, Justice, concurring.

I concur with the majority opinion. However, I wish to add that I agree with the views expressed by Justice Exum in section V. of his dissenting opinion. In my opinion, the comparison pool for proportionality review for first degree murder cases

should include all cases tried under the present death penalty statute which have been affirmed on appeal by this Court, regardless of the punishment imposed. I think it is time for this Court to address this issue.

BRANCH, C. J., joins in this concurring opinion.

EXUM, Justice, dissenting as to sentence.

I.

I find myself, first, in strong disagreement with the majority on an extremely important new question dealing with the construction of our death penalty statute. The majority holds, after somewhat cursory treatment and a barebones analysis, that under the statute, G.S. 15A-2000, if the jury finds: (1) the existence of one or more statutory aggravating circumstances, (2) that the aggravating circumstance(s) so found are sufficiently substantial to call for the death penalty and (3) the aggravating circumstance(s) outweigh the mitigating circumstances, then the jury *must* return the death penalty. Nowhere, of course, does the statute so provide. The majority construes the statute in this way on the sole ground that otherwise the statute would be subject to the constitutional attack that a jury could decide between life and death in its unbridled discretion. Yet decisions of the United States Supreme Court, none of which are mentioned in the majority's discussion, have made it abundantly clear that the majority's interpretation is not constitutionally required.

In one of its first cases construing our death penalty statute, this Court noted, "[t]he first maxim of statutory construction is to ascertain the intent of the legislature. To do this, this Court should consider the statute as a whole, the spirit of the statute, the evils it was designed to remedy, and what the statute seeks to accomplish." *State v. Johnson*, 298 N.C. 47, 56, 257 S.E.2d 597, 606 (1979). In *Johnson*, this Court recognized that our death penalty statute was enacted following a quintet of cases all decided by the United States Supreme Court on 2 July 1976. These cases struck down mandatory death penalty statutes in North Carolina, *Woodson v. North Carolina*, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976) (plurality opinion), and Louisiana, *Roberts v. Louisiana*, 428 U.S. 325, 96 S.Ct. 3001, 49 L.Ed.2d 974 (1976) (plurality opinion), but sustained death penalty statutes which, in varying degrees, sought to control the discretion exercised in capital sentencing in Georgia, *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976) (plurality opinion); Florida, *Proffitt v. Florida*, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976) (plurality opinion); and Texas, *Jurek v. Texas*, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976) (plurality opinion). This Court noted in *Johnson* that these five cases "made clear that neither unbridled, unguided discretion *nor the absence of all discretion* in the imposition of the death penalty is constitutionally permissible." 298 N.C. at 58, 257 S.E.2d at 607 (emphasis supplied). After further discussion of United States Supreme Court decisions and various provisions of the Model Penal Code, upon which our statute was largely based, this Court concluded in *Johnson*, 298 N.C. at 63, 257 S.E.2d at 610:

> In summary, there are a number of controlling factors governing the interpretation of our death penalty statute. Unbridled discretion in the imposition of the sentence is not permitted. On the other hand, sentencing juries must have some discretion to determine in a rational and consistent manner those cases in which the death penalty should be imposed. Juries are to be guided in this process by a carefully defined set of statutory criteria that allow them to take into account the nature of the crime and the character of the accused. Thorough jury instructions, which incorporate and reflect the definitions accorded to these criteria and which are fully applied to the facts of each case, must be given. In each case the process must be directed toward the jury's having a full understanding of both the relevant aggravating and mitigating factors and the neces-

sity of balancing them against each other in determining whether to impose the death penalty. Lastly, any imposition of the death penalty by the jury should be searchingly reviewed by the appellate courts to insure the absence of unfairness, arbitrariness or caprice in the result.

Regarding the question before us, the statute, G.S. 15A-2000, provides in pertinent part as follows:

(b) Sentence Recommendation by the Jury.—... In all cases in which the death penalty may be authorized, the judge shall include in his instructions to the jury *that it must consider* any aggravating circumstance or circumstances or mitigating circumstance or circumstances from the lists provided in subsections (e) and (f) which may be supported by the evidence, and shall furnish to the jury a written list of issues relating to such aggravating or mitigating circumstance or circumstances.

After hearing the evidence, argument of counsel, and instructions of the court, *the jury shall deliberate and render a sentence recommendation to the court, based upon the following matters*:

(1) Whether any sufficient aggravating circumstance or circumstances as enumerated in subsection (e) exist;

(2) Whether any sufficient mitigating circumstance or circumstances as enumerated in subsection (f), which outweigh the aggravating circumstance or circumstances found, exist; and

(3) *Based on these considerations, whether the defendant should be sentenced to death or to imprisonment in the State's prison for life.*

....

(c) Findings in Support of Sentence of Death.—*When the jury recommends sentence of death*, the foreman of the jury shall sign a writing on behalf of the jury which writing shall show:

(1) The statutory aggravating circumstance or circumstances which the jury finds beyond a reasonable doubt; and

(2) That the statutory aggravating circumstance or circumstances found by the jury are sufficiently substantial to call for the imposition of the death penalty; and,

(3) That the mitigating circumstance or circumstances are insufficient to outweigh the aggravating circumstance or circumstances found.

[Emphases supplied.]

In essence, then, the statute provides that in determining whether to impose death or life imprisonment the jury "must consider" certain aggravating and mitigating circumstances; that the jury's sentence recommendation shall be "based upon" the sufficiency of the aggravating circumstance(s) and the mitigating circumstance(s) and their relative weights; and that "when the jury recommends a sentence of death," it must sign a writing in which three questions are answered affirmatively and unanimously beyond a reasonable doubt.

From this statutory scheme the legislative intent clearly emerges. The legislature has sought to strike a balance between fairness to the individual defendant and consistency among the cases in which the death penalty is imposed. It has designed a statute which avoids the two extremes of mandatory death penalties or unbridled discretionary action by juries. The legislature intended for the jury to consider: first, the sufficiency of the aggravating circumstance(s); second, whether any mitigating circumstance(s) exist which outweigh the aggravating circumstance(s); and third, based on these considerations whether to recommend a death sentence or life imprisonment. *Only when the jury determines to recommend death* is the jury required to sign a writing which shows its affirmative, unanimous findings that one or more statutory aggravating circumstances exist beyond a reasonable doubt, that they are sufficiently substantial to make the death penalty appropriate and that the mitigating circumstances do not outweigh the aggravating circumstances.[1] Subsection (b)

1. Although the jury is not required by statute to answer these questions *unless* they recommend death, I believe documentation of the

states in two places that the jury's sentence recommendation is to be *based* on these considerations, not decreed by them. There is nothing in this scheme to suggest a legislative intent *to require* the jury to return a sentence of death even if it should answer the three crucial subsection (c) issues affirmatively, just as there is nothing in the statute which permits a jury to ignore the delineated considerations in its deliberations. To hold, as does the majority, that if affirmative answers in writing to these three issues are prerequisite to a jury's recommendation of death, then death *must* be recommended when the prerequisites are met is, logically, a *non sequitur*.

This logical trap is easily sprung; it caught me in my dissent in *State v. Rook*, 304 N.C. 201, 283 S.E.2d 732 (1981), *cert. denied*, — U.S. —, 102 S.Ct. 1741, 72 L.Ed.2d 155 (1982), where I lapsed into the same fallacy now being urged by the majority.[2] In *Rook*, however, both my dissent and the majority opinion were addressing a different question, *i.e.*, whether the jury was required to specify which mitigating factors it found to exist. The question now being addressed was not raised in *Rook*, and any conclusion about it was not necessary to the dissent. With the benefit of briefing, argument and my own research, I am convinced that my initial conclusion on the point here in issue, as I expressed it in *Rook*, was wrong, just as I believe the majority's similar conclusion is wrong. The conclusion is not less a *non sequitur* because I once subscribed to it.

Our trial judges initially properly construed the statute to mean that if the jury answered the three issues affirmatively it could, but was not required to, recommend the death penalty. The first Pattern Jury Instruction promulgated after the statute provided that if the jury answered the crucial issues affirmatively then it "*may* recommend the death penalty." N.C.P.I.Crim. 150.10, p. 5 (June 1977) (emphasis supplied). A subsequent revision of the instruction emphasized this point by providing that the jury "*may*, although [it] need not, recommend that the defendant be sentenced to death." N.C.P.I.Crim. 150.10, p. 4 (Replacement, May 1979). These instructions, or a variation of them, have been followed in a large number of death penalty cases.[3]

jury's findings in every capital sentencing proceeding, whether they recommend death or life, is necessary for this Court's use in conducting its proportionality review required under G.S. 15A-2000(d)(2).

2. In *Rook*, *supra*, I wrote:

> Indeed, in Georgia, the jury may return a death sentence upon finding one or more aggravating circumstances, no matter how it regards the mitigating circumstances. In contrast, under our statute the jury may return a death sentence recommendation only if it finds: (1) the existence of one or more aggravating circumstances; (2) that the aggravating circumstance(s) found by it are sufficiently substantial to call for the imposition of the death penalty; and (3) that *the mitigating circumstances are insufficient to outweigh the aggravating circumstances*. The clear import of our statute is that a jury, upon finding the requisite existence of aggravating circumstances and their sufficient substantiality, may not recommend life imprisonment unless it further finds that the mitigating circumstances are sufficient to outweigh the aggravating circumstances.

304 N.C. at 242–43, 283 S.E.2d at 757 (emphasis original) (footnote omitted).

3. *See, e.g., State v. Silhan*, 302 N.C. 223, 275 S.E.2d 450 (1981) (R. at 192, "you may recommend death"); *State v. Detter*, 298 N.C. 604, 260 S.E.2d 567 (1979) (R. at 238, "you may recommend"); *State v. Johnson*, 298 N.C. 355, 259 S.E.2d 752 (1979) (R. at 111, "you may recommend"); *State v. Spaulding*, 298 N.C. 149, 257 S.E.2d 391 (1979) (R. at 333, "Based upon these considerations as instructed by the court, you will advise the court whether the defendant should be sentenced to life imprisonment or death"); *State v. Cherry*, 298 N.C. 86, 277 S.E.2d 551 (1979), *cert. denied*, 446 U.S. 941, 100 S.Ct. 2165, 64 L.Ed.2d 796 (1980) (R. at 341, "Based upon these considerations as instructed by the Court, you will advise the Court whether the defendant should be sentenced to life imprisonment or death"); *State v. Goodman*, 298 N.C. 1, 257 S.E.2d 569 (1979) (R. at 185, "you may then recommend the death penalty"); *State v. Jones*, 296 N.C. 495, 251 S.E.2d 425 (1979) (R. at 276, "you may—but you not compelled to—recommend the death penalty").

Other cases reviewed by this Court have contained instructions which went even further in telling the jury that the death sentence was not mandated by affirmative answers to the crucial issues. For example, in *State v. Oliver*, 302

After our decision in *State v. Goodman*, 298 N.C. 1, 257 S.E.2d 569 (1979), the Pattern Jury Instruction for our trial judges was changed so as to provide that if the jury answered the three issues affirmatively, it would be its "duty to recommend that defendant be sentenced to death." N.C.P.I. Crim. 150.10, pp. 3–4 (Replacement, May 1980). The case cited in support of this change in the instruction is *Goodman*.

The issue in *Goodman*, however, was not whether the jury should be told it has a "duty" to recommend the death penalty if it answers the three issues affirmatively and unanimously. The issue in *Goodman* was whether, as the defendant contended, the trial court "should have explained to the jury that it had the option of returning a recommendation of life imprisonment even if aggravating circumstances were found to outweigh mitigating circumstances." Brief for Defendant Appellant at 15–16. Defendant argued that "[i]t should be incumbent upon the trial Court to explain in detail that no mandatory recommendation of the death penalty is required regardless of findings as to aggravating and mitigating circumstances set forth in the statute." *Id.*

Thus, defendant Goodman was arguing that the trial court should be required to *explain* to the jury that it could, in effect, *ignore* the considerations which by statute it must consider in recommending a life or death sentence. This goes far beyond the permissive instruction actually given and upheld in *Goodman, i.e.*, the instruction that if the jury answered the three subsection (c) issues affirmatively and unanimously, it "may then recommend the death penalty." (R. at 185).

The state's brief in *Goodman* recognizes that "the Court left the jury with the understanding that, even should they find more aggravating than mitigating circumstances, they could still recommend life imprisonment.... At no point did the Court state that the jury could not recommend life imprisonment when the aggravating circumstances outweighed the mitigating. What the Court was saying was that (even where such aggravating circumstances appeared to be more substantial than mitigating circumstances) the jury could still recommend life imprisonment." Brief for the state at 19–20.

The Court in *Goodman* answered the defendant's argument as follows, 298 N.C. at 34–35, 257 S.E.2d at 590:

> His argument is that without such instruction the jury will mathematically balance the two types of factors against each other and will impose the death penalty whenever aggravating circumstances outnumber mitigating ones. We do not agree that this is the manner in which a jury will reach its decision on this important question or that the instruction for which defendant contends is required by our statute.
>
> It must be emphasized that the deliberative process of the jury envisioned by G.S. 15A–2000 is not a mere counting process. *State v. Dixon, supra* [283 So.2d 1, Fla.]; *State v. Stewart, supra* [197 Neb. 497, 250 N.W.2d 849]. The jury is charged with the heavy responsibility of subjectively, within the parameters set out by the statute, assessing the appropriateness of imposing the death penalty upon a particular defendant for a particular crime. *Nuances of character and cir-*

N.C. 28, 274 S.E.2d 183 (1981) (R. at 668), the jury was told:

> Unless you have answered Issues One, Two, Four "yes" you must recommend that a defendant in a given case be sentenced to life. Only if you have answered Issues One, Two and Four "yes" may you recommend that a defendant be sentenced to death. Even then, though, you are not required to do so. You still may recommend life imprisonment. However, if you answered Issues One, Two and Four "yes" you are, on further deliberations, satisfied beyond a reasonable doubt that the only just punishment for this defendant is—a given defendant in a given case, is the death penalty, then you may so recommend it; realizing, of course, the tremendous responsibility which rests on your shoulders when you make that recommendation.

See, also, State v. Hutchins, 303 N.C. 321, 279 S.E.2d 788 (1981) (R. at 231, "you would then further deliberate upon your sentence recommendation"); *State v. Small*, 301 N.C. 407, 272 S.E.2d 128 (1980) (R. at 618, "Even though you are not required to do so, you may still recommend life in prison").

cumstance cannot be weighed in a precise mathematical formula.

At the same time, we believe that it would be improper to instruct the jury that they may, as defendant suggests, disregard the procedure outlined by the legislature and *impose the sanction of death* at their own whim. To do so would be to revert to a system pervaded by arbitrariness and caprice. The exercise of such unbridled discretion by the jury under the court's instruction would be contrary to the rules of *Furman* [*v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346] and the cases which have followed it. For these reasons defendant's seventh assignment of error is overruled.

[Emphases supplied.]

The majority's conclusion on this point in the instant case as well as the change in the Pattern Jury Instruction are based on a misreading of *Goodman*. *Goodman* simply recognized that, under the instructions as given, there would be no cause for the jury "mathematically" to balance the aggravating against the mitigating and "impose the death penalty whenever aggravating circumstances outnumber mitigating ones." *Goodman* cautioned that juries should not be instructed in a manner which would cause them to "impose the sanction of death at their own whim." *Goodman* does not support the proposition that a jury has a duty to impose the death penalty whenever it concludes that the statutory aggravating circumstances are sufficiently substantial to call for it and that the mitigating circumstances are insufficient to outweigh the aggravating. *Goodman* recognizes that given such determinations, a jury may yet opt for life imprisonment and notes that there is no way to escape some subjectivity in deciding who shall live and who shall die. Juries are called on in this kind of decision, we said in *Goodman*, to consider "[n]uances of character and circumstance [which] cannot be weighed in a precise mathematical formula."

It is for this reason that a jury ought not be required to return the death penalty simply because it answers the crucial subsection (c) issues affirmatively. Conscientious juries may determine that these issues ought to be answered affirmatively and yet, because of circumstances of the case, "nuances," if you will, not subject to articulation in a statute or a verdict and not perhaps articulable by the jurors themselves, feel impelled to recommend that the death penalty not be imposed.[4] We should not construe our statute to require such a jury, nevertheless, to impose it.

Our statute is designed simply to insure that certain specific (subsection (c)) prerequisites are met before the death penalty is imposed. Its only prerequisites for the imposition of life imprisonment are that the jury base such a decision (subsection (b)) on a weighing against each other of various aggravating and mitigating circumstances which it may find to exist. Although the jury may not recommend death without specifically, and in writing, answering subsection (c) issues affirmatively, even if it does so it may yet recommend life.

The United States Supreme Court has made it quite clear that these kinds of death penalty or life imprisonment decisions do not result in the unbridled discretionary determinations found wanting in *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972) (per curiam). In *Bullington v. Missouri*, 451 U.S. 430, 101 S.Ct. 1852, 68 L.Ed.2d 270 (1981), the Court had

4. Indeed, juries have answered the crucial subsection (c) issues affirmatively and yet either recommended life imprisonment, *State v. King*, 301 N.C. 186, 270 S.E.2d 98 (1980); *State v. Taylor*, 298 N.C. 405, 259 S.E.2d 502 (1979); or were unable unanimously to agree on a sentence, thus requiring the judge to impose a life sentence pursuant to G.S. 15A-2000(b). *State v. Silhan*, 302 N.C. 222, 275 S.E.2d 450 (1981), on resentencing in Columbus Superior Court (Case No. 79CRS1943); *State v. Easterling*, 300 N.C. 594, 268 S.E.2d 800 (1980).

At least one jury has found ambiguity in the "Issues and Recommendation as to Punishment" form generally submitted to juries deliberating on sentences in capital cases. *State v. Lake*, 305 N.C. 143, 286 S.E.2d 541 (1981) (copy found in Case No. 80CRS5530, Onslow Superior Court).

before it a Missouri death penalty statute very similar to ours. In *Bullington*, the Supreme Court noted that a Missouri jury "is instructed that it is not compelled to impose the death penalty, even if it decides that a sufficient aggravating circumstance or circumstances exist and that it or they are not outweighed by any mitigating circumstances or circumstances." 451 U.S. at 434–35, 101 S.Ct. at 1855–56. Although the question was not raised, there is no suggestion in *Bullington* that such a statute would be constitutionally infirm.

In *Gregg v. Georgia*, *supra*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859, the Supreme Court considered a Georgia death penalty statute which provided that the jury could return a sentence of death only if it found the existence of one of ten statutorily specified aggravating circumstances. The jury was not required to return a death sentence even if it found the existence of one or more of the ten statutorily specified aggravating circumstances and was "not required to find any mitigating circumstance in order to make a recommendation of mercy." *Id.* at 197, 96 S.Ct. at 2936. On appeal of his death sentence, defendant argued that because a Georgia jury had "the power to decline to impose the death penalty even if it finds that one or more statutory aggravating circumstances are present," the statute violated the *Furman* prohibition against unbridled discretion. *Id.* 428 U.S. at 203, 96 S.Ct. at 2939. The United States Supreme Court answered by saying:

> This contention misinterprets *Furman* .... Moreover, it ignores the role of the Supreme Court of Georgia which reviews each death sentence to determine whether it is proportional to other sentences imposed for similar crimes. Since the proportionality requirement on review is intended to prevent caprice in the decision to inflict the penalty, *the isolated decision of a jury to afford mercy does not render unconstitutional death sentences imposed on defendants who were sentenced under a system that does not create a substantial risk of arbitrariness or caprice.*

428 U.S. at 203, 96 S.Ct. at 2939 (emphasis supplied). In answering defendant's contention that there were other discretionary decisions which could be made in the processing of a murder case which would result in some candidates for the death penalty actually escaping it, the Supreme Court said:

> Nothing in any of our cases suggests that the decision to afford an individual defendant mercy violates the Constitution. Furman held only that, in order to minimize the risk that the death penalty would be imposed on a capriciously selected group of offenders, the decision to impose it had to be guided by standards so that the sentencing authority would focus on the particularized circumstances of the crime and the defendant.

428 U.S. at 199, 96 S.Ct. at 2937. Mr. Justice White, joined by the Chief Justice and Mr. Justice Rehnquist, said in a concurring opinion in *Gregg*:

> The Georgia Legislature has plainly made an effort to guide the jury in the exercise of its discretion, while at the same time permitting the jury to dispense mercy *on the basis of factors too intangible to write into a statute*, and I cannot accept the naked assertion that the effort is bound to fail.

428 U.S. at 222, 96 S.Ct. at 2947 (emphasis supplied).

Finally, in *Jurek v. Texas*, *supra*, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929, the Supreme Court considered a Texas statute which required the jury to impose the death sentence if it answered three questions affirmatively.[5] The attack made on the Tex-

5. The questions are these:

> (1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;
>
> (2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and
>
> (3) if raised by the evidence, whether the conduct of the defendant in killing the de-

as statute was that it created a mandatory death penalty in violation of the principles laid down in *Woodson v. North Carolina*, *supra*, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944, and *Roberts v. Louisiana*, *supra*, 428 U.S. 325, 96 S.Ct. 3001, 49 L.Ed.2d 974. The Supreme Court struggled with this question because the Texas statute appeared to have no provision for the jury to consider mitigating circumstances. "Thus," the Court said, "the constitutionality of the Texas procedure turns on whether the enumerated questions allow consideration of particularized mitigating factors." 428 U.S. at 272, 96 S.Ct. at 2956. The Court concluded that the jury's consideration of mitigating circumstances, under the interpretation given the second question by the Texas Court of Criminal Appeals, was encompassed in its decision on that question. *See supra* note 5. Therefore, the Court concluded that the statute was not subject to the "mandatory death sentence" attack.

Apparently under the rationale of *Jurek*, the majority's interpretation of our statute would pass constitutional muster. But I am satisfied that the interpretation for which I argue is more solidly supported in the decisions of the United States Supreme Court; whereas the majority's view, which could be supported only by *Jurek*, is at least constitutionally suspect.

Assuming that we are free under the United States Constitution to opt for either interpretation, we should adopt the one which most nearly comports with the legislature's intent as that intent is revealed in the plain words of the statute. The legislature has developed a statutory scheme designed to accommodate the twin "goals of measured, consistent application and fairness to the accused." *Eddings v. Oklahoma*, — U.S. —, —, 102 S.Ct. 869, 874, 71 L.Ed.2d 1, 8 (1982). In *Goodman*, *supra*, 298 N.C. 1, 257 S.E.2d 569, we held that instructions which, in effect, explained to the jury that it could ignore the procedure devised by the legislature were not authorized by our statute and would be contrary to the *Furman* standards. Likewise, instructions that tell the jury they *must* impose the death penalty if they answer certain questions affirmatively and unanimously are not authorized by our statute and fail to give appropriate weight to inarticulable, intangible "[n]uances of character and circumstances." *State v. Goodman*, *supra*, 298 N.C. at 34, 257 S.E.2d at 590.

Our statute, like the Supreme Court said of its decision in *Lockett*,[6] "is the product of a considerable history reflecting the law's effort to develop a system of capital punishment at once consistent and principled but also humane and sensible to the uniqueness of the individual." *Eddings v. Oklahoma*, *supra*, — U.S. at —, 102 S.Ct. at 874, 71 L.Ed.2d at 8. Both the instructions disapproved in *Goodman* and those given in the instant case upset the statute's finely tuned balance between consistency and sensibility to the uniqueness of an individual. The instruction sought by the defendant in *Goodman* tilts too much in favor of individualized consideration at the expense of consistency; whereas the instruction given here tilts too much in favor of consistency at the expense of individualized consideration.

The instruction most in keeping with the legislative design and which ought to be given in all cases is that recommended by the Superior Court Judges' Pattern Jury Instruction Committee in May 1979. In that instruction jury members are told that if they answer the crucial issues affirmatively and unanimously, "you may, although you need not, recommend that the defendant be sentenced to death." N.C.P.I.Crim. 150.10 at 4.

II.

At least two jurors were excluded for cause in the instant case in violation of the

ceased was unreasonable in response to the provocation, if any, by the deceased.

See 428 U.S. at 269, 96 S.Ct. at 2955 (quoting Tex.Code Crim.Proc., art. 37.071(b) (Supp. 1975–76)).

6. *Lockett v. Ohio*, 438 U.S. 586, 604, 98 S.Ct. 2954, 2964, 57 L.Ed.2d 973 (1978) (plurality opinion).

limitations imposed by *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968), an opinion by Mr. Justice Stewart. Some particularly pertinent language of this landmark case bears repeating, 391 U.S. at 519–23, 88 S.Ct. at 1775–77:

> A man who opposes the death penalty, no less than one who favors it, can make the discretionary judgment entrusted to him by the State and can thus obey the oath he takes as a juror. But a jury from which all such men have been excluded cannot perform the task demanded of it.... [A] jury that must choose between life imprisonment and capital punishment can do little more—and must do nothing less—than express the conscience of the community on the ultimate question of life or death.... [A] jury composed exclusively of ... people [who believe in the death penalty] cannot speak for the community. Culled of all who harbor doubts about the wisdom of capital punishment—of all who would be reluctant to pronounce the extreme penalty—such a jury can speak only for [those who believe in the death penalty].
>
> If the State had *excluded only those prospective jurors who stated in advance of trial that they would not even consider returning a verdict of death*, it could argue that the resulting jury was simply 'neutral' with respect to penalty. But when it swept from the jury all who expressed conscientious or religious scruples against capital punishment and all who opposed it in principle, the State crossed the line of neutrality. In its quest for a jury capable of imposing the death penalty, the State produced a jury uncommonly willing to condemn a man to die.
>
> ....
>
> Specifically, we hold that a sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction. No defendant can constitutionally be put to death at the hands of a tribunal so selected.
>
> ....
>
> To execute [such a] death sentence would deprive him of his life without due process of law. [Footnotes omitted.] [Emphasis supplied.]

Furthermore, *id.* at 522–23 n. 21, 88 S.Ct. at 1771 n. 21,

> a prospective juror cannot be expected to say in advance of trial whether he would in fact vote for the extreme penalty in the case before him. The most that can be demanded of a venireman in this regard is that he be willing to *consider* all of the penalties provided by state law, and that he not be irrevocably committed, before the trial has begun, to vote against the penalty of death regardless of the facts and circumstances that might emerge in the course of the proceedings. If the *voir dire* testimony in a given case indicates that veniremen were excluded on any broader basis than this, the death sentence cannot be carried out ....
>
> We repeat, however, that nothing we say today bears upon the power of a State to execute a defendant sentenced to death by a jury from which the only veniremen who were in fact excluded for cause were those who made unmistakably clear (1) that they would *automatically* vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's *guilt*. [Emphasis original.]

The test applicable to this case then, under *Witherspoon*, for excuses for cause on death penalty opposition grounds is that the prospective juror must make it "unmistakably clear" that he or she would "automatically" vote against the death penalty "without regard to any evidence that might be developed at the trial of the case." A juror who has scruples, or reservations, or who is even opposed to capital punishment, but who is not "irrevocably committed, before

the trial has begun, to vote against [it] regardless of the facts and circumstances" that might be brought out at trial, may not be excused for cause. Neither may a juror who states merely that he or she has "'a fixed opinion against' capital punishment" or that he or she does not "'believe in' capital punishment" be excused for cause, because such juror may yet "be perfectly able as a juror to abide by existing law—to follow conscientiously the instructions of a trial judge and to consider fairly the imposition of the death sentence in a particular case." *Boulden v. Holman*, 394 U.S. 478, 483–84, 89 S.Ct. 1138, 1141–42, 22 L.Ed.2d 433 (1969). Jurors may be excused for cause, however, if their opposition to the death penalty is so strong that they cannot take an oath to "follow the law" in trying the case. *Lockett v. Ohio*, 438 U.S. 586, 595–96, 98 S.Ct. 2954, 2959–60, 57 L.Ed.2d 973 (1978) (plurality opinion).

The United States Supreme Court's latest decision applying *Witherspoon* is *Adams v. Texas*, 448 U.S. 38, 100 S.Ct. 2521, 65 L.Ed.2d 581 (1980). In *Adams* the Court made it clear that *Witherspoon* must be followed even under post-*Furman* guided discretion capital sentencing procedures. *Adams* held that because of *Witherspoon* limitations jurors may not be excused for cause on the ground that their opposition to the death penalty might "affect" their deliberations on issues of fact which might arise in the case.[7] The Court said, 448 U.S. at 46–47:

> [A] Texas juror's views about the death penalty might influence the manner in which he performs his role but without exceeding the 'guided jury discretion,' 577 S.W.2d, [717] at 730, permitted him under Texas law. In such circumstances, he could not be excluded consistently with *Witherspoon*.

It said, further, 448 U.S. at 49–50, 100 S.Ct. at 2528–29, that jurors were improperly excluded

> who stated that they would be 'affected' by the possibility of the death penalty, but who apparently meant only that the potentially lethal consequences of their decision would invest their deliberations with greater seriousness and gravity or would involve them emotionally. Others were excluded only because they were unable positively to state whether or not their deliberations would in any way be 'affected.' But neither nervousness, emotional involvement, nor inability to deny or confirm any effect whatsoever is equivalent to an unwillingness or an inability on the part of the jurors to follow the court's instructions and obey their oaths, regardless of their feelings about the death penalty. The grounds for excluding these jurors were consequently insufficient under the Sixth and Fourteenth Amendments. Nor in our view would the Constitution permit the exclusion of jurors from the penalty phase of a Texas murder trial if they aver that they will honestly find the facts and answer the questions in the affirmative if they are convinced beyond reasonable doubt, but not otherwise, yet who frankly concede that the prospects of the death penalty may affect what their honest judgment of the facts will be or what they may deem to be a reasonable doubt. Such assessments and judgments by jurors are inherent in the jury system, and to exclude all jurors who would be in the slightest way affected by the prospect of the death penalty or by their views about such a penalty would be to deprive the defendant of the impartial jury to which he or she is entitled under the law.

If only one juror is excused for cause, in violation of *Witherspoon* limitations, a sentence of death cannot stand. *Davis v. Georgia*, 429 U.S. 122, 97 S.Ct. 399, 50 L.Ed.2d 339 (1976) (per curiam). The *Davis* Court noted, 429 U.S. at 123, 97 S.Ct. at 399:

> Unless a venireman is 'irrevocably committed, before the trial has begun, to vote against the penalty of death regardless of the facts and circumstances that might emerge in the course of the proceedings,' 391 U.S. at 522 n. 21 [88 S.Ct. at 1777 n. 21], he cannot be excluded; if a venire-

7. *See supra* note 5 and accompanying text.

man is improperly excluded even though not so committed, any subsequently imposed death penalty cannot stand.

This Court held in *State v. Bernard*, 288 N.C. 321, 325, 218 S.E.2d 327, 330 (1975), that a juror could not be excused merely because "he *thought* he would automatically vote against the imposition of the death penalty regardless of the evidence." (Emphasis original.)

Finally, the meaning of the voir dire colloquy is that which would be given it by the prospective juror rather than one trained in the law. "The critical question, of course, is not how the phrases employed in this area have been construed by courts and commentators. What matters is how they might be understood—or misunderstood—by prospective jurors." *Witherspoon v. Illinois, supra*, 391 U.S. at 515-16 n. 9, 88 S.Ct. at 1773 n. 9 (quoted with approval in *Boulden v. Holman, supra*, 394 U.S. at 481-82, 89 S.Ct. at 1140).

Turning now to the challenges for cause here under attack, I am satisfied that prospective juror Mary Neal was excused for cause on broader grounds than *Witherspoon* permits. Neal, after an extended colloquy with the prosecutor, never expressed any categorical opposition to the death penalty. She simply said that she would have to be absolutely certain of a defendant's guilt before she could vote to impose it. That portion of the colloquy which accurately reflects her attitude is the following:

Q. Do you have any objection to the death penalty?

A. Well, that's a hard question to answer.

Q. Yes, ma'am.

A. I've never been able to answer it like a cut dried thing. It's hard for me, very hard for me to make decisions, I've never been able to make decisions very well. I had someone to help me, but I'm hard to convince too. I almost have to see something before I could really say so. That's the only way I know to answer you.

....

Q. Let me ask that question a different way, Mrs. Neal, if you're a member of this jury and we get to the second part of the trial, that means you've already found him guilty of murder in the first degree in one or both cases, based on the evidence in this case, what happened in this case and based on the law that Judge Walker gives to you, as he tells you the law, if you deem it to be appropriate, could you impose the death penalty?

A. I don't think so, I really don't believe so.

Q. I understand this is a tough area, but we have to inquire about this now and everyone is entitled to their own opinion. Are you saying, ma'am, that you could not and you would not vote to impose the death penalty in this case, regardless of the evidence?

A. I don't know. I guess if it was proven to me, I guess I could.

Q. If what was proven to you?

A. I would have to be—I would have to absolute know for sure, I mean no doubt whatsoever.

....

Q. As a juror, can you envision a situation where you would impose the death penalty, you're not going to be an eyewitness, you're going to have to act on what other people tell you they saw or heard.

A. Okay, already proven guilty—if I went along with the guilty part, if I decided they were guilty—no, I will not.

Q. You could not impose the death penalty regardless of what the evidence is?

A. I don't believe so.

MR. WANNAMAKER: If your Honor please, we challenge for cause.

THE COURT: I understand, Mrs. Neal. I know this is very difficult for you, but it's necessary to have your candid and frank answers and I thank you for them.

Do I understand that you could not even before you hear the testimony under any circumstances, impose the death penalty?

MARY D. NEAL: No, I just don't think so.

At most, Neal's attitude toward the death penalty "affected" her deliberations on the guilt phase of the case in the sense that she would have to be absolutely certain of defendant's guilt. "[P]rospects of the death penalty may affect what [a juror's] honest judgment of the facts will be or what [a juror] may deem to be a reasonable doubt," *Adams v. Texas, supra*, 448 U.S. at 50, 100 S.Ct. at 2529, without the juror's subjection on that ground to a challenge for cause. Neal never "unmistakably" said that she would not impose the death penalty, or that she would "automatically" vote for life imprisonment, regardless of what the evidence might show. She said she didn't "believe" and didn't "think" she could vote for death. She never said, absolutely, that she could or would not. She should not have been excused for cause.

Prospective juror Frank Rogers said, "I don't go for [the death penalty] too much" and "I don't think much of the death penalty." He never said he was categorically opposed to the death penalty. When asked whether he could consider imposing the death penalty, the following occurred:

> A. I can consider, but as I say—
>
> Q. You tell me you would consider it but then you wouldn't do it, is that what you are saying?
>
> MR. HARRISON: Objection.
>
> A. (By witness) I said I would lean toward life imprisonment, if you want me to tell the truth about it, that's what I'm doing.

At that point, the court intervened as follows:

> THE COURT: Mr. Juror, are you saying that before you have heard any evidence in this case, Mr. Rogers, if the defendant should be found guilty of either charge of murder in the first degree, without hearing any evidence, that under no circumstances would you return a verdict which would result in the imposition of the death penalty?
>
> MR. ROGERS: That is true.

Thus Rogers did not say that he could or would not impose the death penalty or that he would automatically vote for life imprisonment, regardless of evidence *that might be introduced at the trial.* He said he could not impose it under any circumstances "without hearing any evidence." Obviously, the learned trial judge was attempting to ask Rogers whether he could impose it under any circumstances regardless of what evidence adduced at trial might show, and to one trained in the law that is what the court's question might mean. To Rogers, a layman, the question could mean no more than what the words actually used by the trial judge would ordinarily convey. Roger's position, then, was simply that he could not impose the death penalty until he at least had heard some evidence in the case. The thrust of the entire colloquy seems to be that, depending on what the evidence adduced tended to show, Rogers could consider the death penalty, that he tended to favor life imprisonment, but that he would not convince himself one way or the other without hearing some evidence. Rogers should not have been excused for cause.

III.

The majority concludes that the trial court did not err in refusing to submit both in his instructions and on the written list defendant's "relatively low mentality" as a mitigating circumstance because there was no evidence to support it and, even if there had been supporting evidence, the error could not have been prejudicial. As the majority correctly notes, a defendant's low mentality, if it exists, is "properly considered in mitigation of a capital felony."

I cannot agree with the majority that the evidence does not support defendant's "relatively low mentality" mitigating circumstance. Defendant's psychiatric witness, Dr. Billy Royal, testified that defendant scored 66 on an intelligence test; but, he said, "[w]e felt that his other tests indicated that his I.Q. was probably a little higher than that and fell at least into the low-normal range of intelligence." Apparently the majority concludes that any intelligence quotient which is within a "normal range" cannot be considered by a jury in a capital case unless it is proffered by the defendant

as an absolute score on an intelligence test. The majority concludes that if it is proffered under the label "relatively low mentality," rather than as a raw score, it may not be considered.

I simply cannot subscribe to, nor do I really understand, the distinction drawn by the majority. Any kind of absolute score on an intelligence test, in order to be meaningful to a lay jury or for that matter to lawyers and judges, needs explanation by competent expert testimony. The testimony in this case was that defendant's intelligence was in the "low-normal range." Defendant asked that his "*relatively* low mentality" be submitted as a mitigating circumstance. The evidence supports that he did have a "*relatively* low mentality." It should be for the jury to assess this quality in terms of its mitigating effect. It is not for the court to say that the jury could not, as a matter of law, consider a person's "relatively low mentality" as a mitigating circumstance because the mentality is within the outer limits of "normal." To me, the phrase "relatively low mentality" accords precisely with the evidence which was introduced. A person whose intelligence is in the low-normal range must perforce have a relatively low mentality. Contrary to the majority's conclusion, the terms are synonymous.

Neither on this record am I able to say that not permitting the jury to consider this mitigating circumstance was harmless beyond a reasonable doubt. Not to permit a jury to consider any relevant mitigating circumstance is an error of constitutional dimension. *Eddings v. Oklahoma, supra*, ——U.S. ——, 102 S.Ct. 869, 71 L.Ed.2d 1; *Lockett v. Ohio, supra*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973. Before we can deem such an error harmless, we must be satisfied "that it was harmless beyond a reasonable doubt." *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 828, 17 L.Ed.2d 705 (1967); G.S. 15A–1443(b). The burden is upon the state to so demonstrate. *Id.*

Of the ten mitigating circumstances submitted, we know from the record only that the jury found "one or more." We do not know how many beyond one it found. It is possible that the jury found only one mitigating circumstance to exist out of the list of ten. If it did, the failure to submit an additional mitigating circumstance which should have been submitted and which the jury could have found to exist might well have made a difference in the jury's ultimate recommendation. At least I cannot say beyond a reasonable doubt that it would not have made a difference.

The United States Supreme Court has recently recognized that a youthful defendant's mental development is a significant mitigating circumstance. *Eddings v. Oklahoma, supra*, was a capital case in which, under Oklahoma procedure, the sentencing decision was made by the trial judge. The judge, after hearing evidence, found all of three alleged aggravating circumstances to exist beyond a reasonable doubt. He also found that the youth of the defendant (age sixteen) was a mitigating circumstance "of great weight." The trial judge, however, did not believe he could consider "*the fact of this young man's violent background.*" *Id.* at ——, 102 S.Ct. at 873, 71 L.Ed.2d at 7 (emphasis original). For failure of the trial judge to consider this additional mitigating circumstance, the United States Supreme Court set aside the death penalty and remanded for further proceedings. The Court said, *id.* at ——, 102 S.Ct. at 877, 71 L.Ed.2d at 12:

> [J]ust as the chronological age of a minor is itself a relevant mitigating factor of great weight, so must the background *and mental* and emotional *development* of a youthful defendant be duly considered in sentencing. [Emphasis supplied.]

In the case at bar the trial judge's refusal to submit and instruct on defendant's "relatively low mentality" as a mitigating circumstance deprived the defendant of his right to have the jury consider his "mental ... development." The error was not cured by submitting to the jury the catchall language of the tenth mitigating circumstance when it was unaccompanied by any specific instruction relating to the particu-

lar circumstance of defendant's low mentality.

For the foregoing reasons, I vote to vacate the death sentence imposed in this case and to remand for a new sentencing hearing. I concur in the majority's conclusion that there was no prejudicial error in the guilt phase of the case.

V.

This is yet another in a growing number of cases in which a majority of the Court has affirmed the death penalty and in conducting its statutorily mandated "proportionality review" of the death sentence has failed to advise the bar of the manner in which it conducts such a review. The majority, unlike courts in other jurisdictions which have statutes similar to ours, has yet to tell the bar whether its review is based on comparisons with those cases in which the death sentence was imposed at trial and affirmed on appeal, or with those cases in which the jury could have recommended the death penalty but instead recommended life imprisonment and which have been reviewed on appeal, or with cases from some other kind of pool. It is time for the majority to declare itself on this important question, and I urge it to use as a pool for comparison purposes all cases tried under the new death penalty statute, whether the jury recommended death or life imprisonment and which have been reviewed on appeal by this Court.

The statute, G.S. 15-2000(d)(2), requires us to impose a life sentence if we find that a death sentence imposed by the trial court "is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." This language is identical to language in Georgia's death penalty statute. *See* Ga.Code Annot. § 27-2537(c)(3) (1978). The Georgia Supreme Court looks to all appealed murder cases, whatever the sentence imposed, in making its comparisons. *Ross v. State*, 233 Ga. 361, 365-66, 211 S.E.2d 356, 359 (1974), *cert. denied*, 428 U.S. 910, 96 S.Ct. 3222, 49 L.Ed.2d 1217 (1976).[8] In sustaining the Georgia death penalty statute, the United States Supreme Court relied on the Georgia Supreme Court's proportionality review safeguard. Of it, the United States Supreme Court said in *Gregg v. Georgia*, *supra*, 428 U.S. at 206, 96 S.Ct. at 2940:

> In particular, the proportionality review substantially eliminates the possibility that a person will be sentenced to die by the action of an aberrant jury. *If a time comes when juries generally do not impose the death sentence in a certain kind of murder case*, the appellate review procedures assure that no defendant convicted under such circumstances will suffer a sentence of death. [Emphasis supplied.]

The Florida Supreme Court in conducting its proportionality review also compares all appealed murder cases, including those where a sentence less than death was imposed. It has concluded that ignoring life sentences imposed in factually similar cases would make its review procedure constitutionally defective. *McCaskill v. State*, 344 So.2d 1276 (Fla.1977) (per curiam).

The plain words of our statute require that we compare the case before us not only with similar cases in which the death penalty has been imposed but with similar cases in which the jury was permitted to consider it but decided instead to recommend life imprisonment. The basic purpose of proportionality review is to make sure that the death sentence in the case before us is not "excessive" to sentences "imposed in similar cases." If we look for comparison only to cases in which the death penalty has been imposed, the sentence in the case under review could never be excessive because one death sentence never "exceeds" another. It is only by comparing the case being reviewed in which a death sentence was imposed with other similar cases in which life was imposed that we can determine wheth-

8. The Georgia Supreme Court also noted "that nothing in the statute forecloses this court during the course of its independent review from examining non-appealed cases and cases in which the defendant pleaded guilty to a lesser offense." *Ross v. State*, *supra*, 233 Ga. at 366, 211 S.E.2d at 359.

er the death penalty in the case being reviewed is really excessive to the penalty being imposed in similar cases. For, to reiterate what the Supreme Court said in *Gregg v. Georgia, supra*, if there are certain kinds of murder cases in which our juries are generally not recommending death, then an occasional death sentence imposed in those kinds of cases ought to be set aside by this Court.[9]

We ought not limit ourselves only to cases where the death sentence was imposed and affirmed. To do so means that we only ask whether the case under review is as bad as the other death cases. The legislature intended us not only to make that determination but also to determine whether the case under review is more deserving of the death penalty than similar cases in which life sentences have been imposed. The statute's plain language requires that we make both kinds of comparisons. Of the two, the latter is the more meaningful and is probably constitutionally required.

Further, by using only other death sentence cases affirmed on appeal, the Court severely limits the pool of cases available for comparison. Since the effective date of our capital punishment statute, 7 June 1977, there have been only six such cases. *See State v. Taylor*, 304 N.C. 249, 283 S.E.2d 761 (1981); *State v. Rook, supra*, 304 N.C. 201, 283 S.E.2d 732; *State v. Hutchins, supra*, 303 N.C. 321, 279 S.E.2d 788; *State v. Martin*, 303 N.C. 246, 278 S.E.2d 214, *cert. denied*, — U.S. —, 102 S.Ct. 431, 70 L.Ed.2d 240 (1981); *State v. McDowell*, 301 N.C. 279, 271 S.E.2d 286 (1980), *cert. denied*, 450 U.S. 1025, 101 S.Ct. 1731, 68 L.Ed.2d 220 (1981); *State v. Barfield*, 298 N.C. 306, 259 S.E.2d 510 (1979), *cert. denied*, 448 U.S. 907, 100 S.Ct. 3050, 65 L.Ed.2d 1137 (1980). The statute requires that we compare factually "similar" cases. Similar cases for comparison purposes are simply not present in such a small sampling. The Court should want to expand, rather than restrict, the pool of cases so that truly similar cases will be more quickly available and we can begin to make the comparisons which the statute requires.

The bar is entitled to know upon what basis we are conducting the proportionality review mandated by the statute. Defendant Pinch has expressly and reasonably requested that we provide this knowledge. We should grant the request. We should not continue to keep the manner in which we perform this duty shrouded in mystery.

STATE of North Carolina

v.

Larry Darnell WILLIAMS.

No. 70A81.

Supreme Court of North Carolina.

June 2, 1982.

Defendant was convicted before the Superior Court, Gaston County, Frank W. Snepp, Jr., J., of first-degree murder under the felony-murder rule and was sentenced to death. The defendant appealed. The Supreme Court, Meyer, J., held that: (1) record clearly supported jury's guilty verdict and its finding of the aggravated circumstance upon which sentencing court based its sentence of death, and (2) sentence of death was not excessive or disproportionate to penalty imposed in similar cases, considering both crime and defendant.

9. In my dissenting opinion in *State v. Rook, supra*, 304 N.C. at 245–46, 283 S.E.2d at 758–59, I pointed out that rarely do juries in this state impose the death penalty in cases where a defendant was found to have been under the influence of a mental or emotional disturbance or whose capacity to appreciate the criminality of his conduct or to conform his conduct to law was impaired. I suggested that this Court should be slow to affirm death penalties in which either of these mitigating circumstances was found to exist because the penalty might well be excessive to the penalty imposed generally by juries in these kinds of cases.

APPENDIX E

Part III of Reasons for Granting the Writ
from Petition for Writ of Certiorari,
Michael Edward Pinch, Petitioner v. State
of North Carolina, No. 82 - _____
(Filed contemporaneously with this Petition.)

III. THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE NORTH CAROLINA SUPREME COURT HAS MISAPPREHENDED THE MEANING OF FURMAN V. GEORGIA, 408 U.S. 238, BY HOLDING THAT A CONSTRUCTION OF ITS DEATH PENALTY STATUTE WHICH WOULD PERMIT A JURY TO RENDER A LIFE VERDICT IF IT MADE THREE SEPARATE FINDINGS REGARDING AGGRAVATING CIRCUMSTANCES WOULD CONSTITUTE UNCONSTITUTIONAL UNBRIDLED DISCRETION.

The majority of the court below construed North Carolina's post-Woodson[12] death penalty statute, N.C. Gen. Stat. § 15A-2000 et seq. (1977), Appendix C, infra, to require - instead of permit - a capital verdict upon certain specific jury findings. 292 S.E.2d at 226-27. Petitioner's jury had been instructed that "it had a duty to recommend a sentence of death if it found three things[13] . . .." 292

Footnote 11 concluded:

249, 283 S.E.2d 761 (1981); State v. Pinch, ___ N.C. ___, 292 S.E.2d 203 (1982). In the first of these cases, the court characterized §2000(d)(2) as providing it "statutory discretion." Barfield, 259 S.E.2d at 544.

In petitioner's case, the dissenter thought it was time that the court advise the bar "the manner in which it conducts its review." 292 S.E.2d at 242. He, joined by two others, 292 S.E.2d at 229-30, believed the court should compare each death penalty with cases which have been reviewed by the court "whether the jury recommended death or life imprisonment." Ibid. In two affirmances since petitioner's, some passing reference has been given to other affirmed death penalty cases. State v. Williams, ___ N.C. ___, 292 S.E.2d 243, 263-64 (1982) (citing all affirmed death cases), and State v. Smith, ___ N.C. ___, 292 S.E.2d 264, 276-77 (1982) (citing two affirmed death cases). Later, in State v. Brown, ___ N.C. ___, 293 S.E.2d 569 (1982), the court noted that it has not said what group of cases it looks to for its comparisons, 293 S.E.2d at 590, and proceeded "to conclude that the sentence is not disproportionate or excessive considering both the crime and the defendant" without reference to any other case. 293 S.E.2d at 591.

Thus, the North Carolina Supreme Court has now affirmed ten death sentences without any semblance of proportionate review even to other death penalty verdicts. The only attempt at such review was in one case, by a dissenting Justice. State v. Hook, supra, 283 S.E.2d 758-61.

12 Woodson v. North Carolina, 428 U.S. 280 (1976).

13 The three required findings were:
"(1) that one or more statutory aggravating circumstances existed; (2) that the aggravating circumstances were substantial enough to warrant the

S.E.2d at 227. (Emphasis in original). Petitioner argued that these instructions violated the statute.[14] He

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Footnote 13 concluded:

death penalty; and (3) that the aggravating circumstances outweighed the mitigating circumstances beyond a reasonable doubt." 292 S.E.2d at 227. See N.C. Gen. Stat. § 15A-2000(c)(1), (2) and (3) quoted in footnote 14, infra.

14 The relevent portions of the statute are:

(b) Sentence recommendation by the Jury.--- Instructions determined by the trial judge to be warranted by the evidence shall be given by the court in its charge to the jury prior to its deliberation in determining sentence. In all cases in which the death penalty may be authorized, the judge shall include in his instructions to the jury that it must consider any aggravating circumstance or circumstances or mitigating circumstance or circumstances from the lists provided in subsections (3) and (f) which may be supported by the evidence, and shall furnish to the jury a written list of issues relating to such aggravating or mitigating circumstance or circumstances.

After hearing the evidence, argument of counsel, and instructions of the court, the jury shall deliberate and render a sentence recommendation to the court, based upon the following matters:

(1) Whether any sufficient aggravating circumstance or circumstances as enumerated in subsection (3) exist;

(2) Whether any sufficient mitigating circumstance or circumstances as enumerated in subsection (f), which outweigh the aggravating circumstance or circumstances found, exist; and

(3) Based on these considerations, whether the defendant should be sentenced to death or to imprisonment in the State's prison for life.

The sentence recommendation must be agreed upon by a unanimous vote of the 12 jurors. Upon delivery of the sentence recommendation by the foreman of the jury, the jury shall be individually polled to establish whether each juror concurs and agrees to the sentence recommendation returned.

If the jury cannot, within a reasonable time, unanimously agree to its sentence recommendation, the judge shall impose a sentence of life imprisonment; provided, however, that the judge shall in no instance impose the death penalty when the jury cannot agree unanimously to its sentence recommendation.

(c) Findings in Support of Sentence of Death.--- When the jury recommends a sentence of death, the foreman of the jury shall sign a writing on behalf of the jury which writing shall show:

contended that the three jury findings are necessary, but insufficient, to support a death verdict; that the statute required that the jury still make the final ultimate choice, whether petitioner should be sentenced to die or to life imprisonment; and that therefore the crucial issue in his case had been withdrawn from his jury by the judge's charge.

The North Carolina Supreme Court rejected petitioner's argument based on its belief that otherwise the jury would be permitted "to exercise unbridled discretion . . .," 292 S.E.2d at 227, prohibited by Furman v. Georgia, 408 U.S. 238 (1972).

Justice Exum, in dissent on this point, put the issue clearly:

> I find myself, first, in strong disagreement with the majority on an extremely important new question dealing with the construction of our death penalty statute. The majority holds, after somewhat cursory treatment and a bare-bones anaylsis, that under the statute, G.S. 15A-2000, if the jury finds: (1) the existence of one or more statutory aggravating circumstances, (2) that the aggravating circumstance(s) so found are sufficiently substantial to call for the death penalty and (3) the aggravating circumstance(s) outweigh the mitigating circumstances, then the jury must return the death penalty. Nowhere, of course, does the statute so provide. The majority construes the statute in this way on the sole ground that otherwise the statute would be subject to the constitutional attack that a jury could decide between life and death in its unbridled discretion. Yet decisions of the United States Supreme Court, none of which are mentioned in the

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Footnote 14 concluded:

> (1) The statutory aggravating circumstance or circumstances which the jury finds beyond a reasonable doubt; and
> (2) That the statutory aggravating circumstance or circumstances found by the jury are sufficiently substantial to call for the imposition of the death penalty; and,
> (3) That the mitigating circumstance or circumstances are insufficient to outweigh the aggravating circumstance or circumstances found.

N.C. Gen. Stat. §15A-2000(b) and (c).

majority's discussion,[15] have made it abundantly clear that the majority's interpretation is not constitutionally required. (Emphasis in orignal).

292 S.E.2d at 230. Justice Exum, finding no barrier in this Court's death penalty decisions to the construction of the statute urged by petitioner, proceeded "'to ascertain the intent of the legislature,'" 292 S.E.2d at 230, and concluded that the jury members should be "told that if they answer the crucial issues affirmatively and unanimously, 'you may, although you need not, recommend that the defendant be sentenced to death,'" 292 S.E.2d at 236, an instruction which had been "recommended by the Superior Court Judges Pattern Jury Instruction Committee in May 1979," ibid, but which was replaced in May 1980 after State v. Goodman, 298 N.C. 1, 257 S.E.2d 569 (1979), by the language used by the judge at petitioner's trial.

Since the North Carolina court has interpreted its statute "as it did because it felt under compulsion of federal law as enunciated by this court . . .," Missouri ex rel. Southern R. Co. v. Mayfield, 340 U.S. 1, 5 (1950), a federal question is presented for review. Ibid. State courts are, of course, free to interpret their statutes "solely as a matter of [local] law." Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, 568 (1977). However, when a "reading of a whole opinion shows [that the state court

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15 The statement that none of this Court's decisions are "mentioned in the majority's decision" may be somewhat misleading. The majority had said that "defendant's contention was implicitly answered in State v. Goodman, 298 N.C. 1, 257 S.E.2d 569 (1979) . . ." and then quoted from Goodman including the following:

> The exercise of such unbridled discretion by the jury under the court's instructions would be contrary to the rules of Furman and the cases which have followed it. Id. at 35, 257 S.E.2d at 590.

292 S.E.2d at 227. Thus, the court's holding in this case was specifically grounded -- albeit within a quote -- upon its interpretation of this Court's Eighth Amendment decisions.

ruled] not as a matter of statutory construction, but because it thought the Federal Constitution required such action," Red Cross Line v. Atlantic Fruit Co., 264 U.S. 109, 120 (1924), then a federal question is presented for review by this Court. State Tax Commission v. Van Cott, 306 U.S. 511, 514 (1939). Moreover, a federal question is also presented if the State court decision rests upon both state and federal law but "these two grounds are so interwoven that [this Court is] unable to conclude that the judgment rests upon an independent interpretation of the State law." Ibid. Furthermore, a federal question remains when "doubt" exists as to whether the State court "did not deem itself bound" by the federal considerations, Missouri ex rel. Southern R. Co. v. Mayfield, supra, or where the decision "might have been decided differently if the court below had felt free, under [this Court's] decisions, to do so." Perkins v. Benguet Consol. Mining Co., 342 U.S. 437, 443 (1951); United Air Lines v. Mahin, 410 U.S. 623, 632 (1973). See, also Delaware v. Prouse, 440 U.S. 648, 653 (1979).

There is no doubt here that the North Carolina Supreme Court adopted a construction of its statute as it did because it "deem[ed] itself bound," Missouri ex rel. Southern R. Co. v. Mayfield, 340 U.S. at 4, by "'the rules of Furman [v. Georgia, 408 U.S. 238] and the cases which have followed it.'" 292 S.E.2d at 227.

It was expected by the litigants below that this "extremely important new question dealing with the construction of our death penalty statute," 292 S.E.2d at 230 (Exum, J. dissenting), would be controlled by the court's interpretation of Furman. The issue originated from language in the court's decision in State v. Goodman, 298 N.C. 1, 257 S.E.2d 569 (1979). There the jury had been instructed that if it

answered the three statutorily required "issues affirmatively and unanimously, it 'may then recommend the death penalty.' (R. at 185)." 292 S.E.2d at 233 (Exum, J. dissenting). (Emphasis in original). It had not been instructed, as was petitioner's jury, that after making those findings it was then duty bound to recommend death. Goodman argued on appeal that there should have been further instructions that the jury, "'had the option of returning a recommendation of life imprisonment even if aggravating circumstances were found to outweigh mitigating circumstances.' Brief for Defendant Appellant at 15-16." Ibid. The court rejected that argument specifically relying upon its understanding of Furman. The Court held that to adopt Goodman's proposed instructions,

> would be to revert to a system pervaded by arbitrariness and caprice. The exercise of such unbridled discretion by the jury under the court's instruction would be contrary to the rules of Furman and the cases which have followed it.

298 N.C. at 35, 257 S.E.2d at 598.

As noted above, prior to Goodman, the North Carolina Pattern Jury Instructions promulgated by a committee of the Conference of Superior Court Judges had advised trial judges to instruct the jury that it "'may although it need not, recommend that the defendant be sentence to death.'" 292 S.E.2d at 232 (Exum, J. dissenting), upon making the statutory findings. Such instructions "or a variation of them" were given "in a large number of death penalty cases."[16] In some case, where jurors were so instructed, defendants received life sentences notwithstanding affirmative answers to the three issues. Id. at 234 n.4.

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16 Many such cases are listed at 292 S.E.2d at 232 n.3 (Exum, J. dissenting).

In reliance upon Goodman, the Pattern Jury Instructions were changed in May 1980 to impose a "duty to recommend that the defendant be sentenced to death," id. at 233, if the necessary findings were made in favor of the State.

In the North Carolina Supreme Court, petitioner not only advanced arguments in support of his contention that the General Assembly had intended that jurors be permitted to recommend life imprisonment notwithstanding findings of aggravating circumstances sufficient to call for the imposition of the death penalty which outweighed mitigating circumstances, he also sought to respond to the concerns expressed by the court in Goodman that such a construction might run afoul of the prohibitions against unbridled jury discretion.

The State, in its brief, chose to ignore all of petitioner's traditional arguments regarding legislative intent. The court had previously canvassed the legal and legislative history of the 1978 enactment and concluded that the General Assembly had, even more than the legislators of Georgia and Florida, borrowed extensively from the Model Penal Code (MPC). State v. Johnson I, 298 N.C. 47, 56-63, 257 S.E.2d 597, 608-612 (1979).

> The North Carolina statute follows both in broad outline and in detail the MPC even more closely than did the statutes of Georgia and Florida. This is appropriate inasmuch as the concerns to which the MPC was addressed were the same as those considered controlling in the leading opinions of the United States Supreme Court in the cases discussed above.

298 N.C. at 62-63. Petitioner, therefore, argued that since under the models for the North Carolina statute, which had been approved by this Court, juries are free to recommend life regardless of any subsidiary findings, see Proffitt v. Florida, 428 U.S. 242, 248, Gregg v. Georgia, 428 U.S. 153, 165-166, 207; MPC, Section 210.6(2), such a construction of

the North Carolina statute was intended by the General Assembly. The State's brief had no answer to these arguments.

The total thrust of the State's brief was that petitioner's construction would be unconstitutional. Brief for the State, pp. 67-72. "If the jury were allowed to make the further decision requested by the defendant, the jury would be allowed to engage in the very type of unbridled discretion which Furman simply does not allow." Id. at 72.

The State prevailed below on exactly the ground it had advanced. The majority held that petitioner's construction would result in "unbridled" jury discretion allowing the jury "arbitrarily or capriciously [to] impose or reject a sentence of death." 292 S.E.2d at 227 (emphasis in original). The opinion on this point concluded with the quotation from Goodman that "'the exercise of such unbridled discretion by the jury under the court's instruction would be contrary to the rules of Furman and the cases which have followed it.'"[17] Ibid.

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17 The Court's full treatment of petitioner's assignment of error was as follows:

> Both the prosecutor and the trial court advised the jury that it had a duty to recommend a sentence of death if it found three things: (1) that one or more statutory aggravating circumsances existed; (2) that the aggravating circumstances were substantial enough to warrant the death penalty; and (3) that the aggravating circumstances outweighed the mitigating circumstances beyond a reasonable doubt. On the other hand, the jury was also advised that it had the duty to recommend a sentence of life imprisonment if it did not find any one of those three things. These directions to the jury were based upon the statutory directions to the jury were based upon the statutory criteria set forth in G.S. 15A-2000(b) and (c) and conformed to the N.C. Criminal Pattern Jury Instructions § 150.10 (1980).[16]
>
> Nevertheless, defendant assigns error to the foregoing on the basis that such instructions "prejudically withdrew from the jury its final option . . . to recommend a life sentence nothwithstandng its earlier findings." Defendant's Brief at 75. This assignment lacks merit.

A reading of the "opinion as a whole," State Tax Commission v. Van Cott, supra, shows that the "majority construe[d] the statute in this way on the sole ground that otherwise the statute would be subject to constitutional attack that a jury could decide between life and death in its unbridled discretion." 292 S.E.2d at 230 (Exum, J. dissenting). At the very least, "[g]iving the opinion of the Supreme Court of [North Carolina] a scope most favorable to reliance on a non-federal ground, doubt still remains

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Footnote 17 concluded:

> The jury had no such option to exercise unbridled discretion and return a sentencing verdict wholly inconsistent with the findings it made pursuant to G.S. 15A-2000(c). The jury may not arbitrarily or capriciously impose or reject a sentence of death. Instead, the jury may only exercise guided discretion in making the underlying findings required for a recommendation of the death penalty within the "carefully defined set of statutory criteria that allow them to take into account the nature of the crime and the character of the accused." State v. Johnson [I], 298 N.C. 47, 63, 257 S.E.2d 597, 610 (1979), see State v. Barfield, 298 N.C. 306, 349-52, 259 S.E.2d 510, 541-43 (1979), cert. denied, 448 U.S. 907, 100 S.Ct. 3050, 65 L.Ed.2d 1137 (1980). Moreover, defendant's contention was implicitly answered in State v. Goodman, 298 N.C. 1, 257 S.E.2d 569 (1979), in which this Court overruled an assignment of error alleging that the trial court had erred in failing to instruct the jury that it could still recommend life imprisonment even though it found that the aggravating circumstances outweighed the mitigating ones. Justice Britt, speaking for the Court in Goodman, explained that:
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> > [I]t would be improper to instruct the jury that they may, as defendant suggests, disregard the procedure outlined by the legislature and impose the sanction of death at their own whim. To do so would be to revert to a system pervaded by arbitrariness and caprice. The exercise of such unbridled discretion by the jury under the court's instruction would be contrary to the rules of Furman [v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346] and the cases which have followed it.
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> Id. at 35, 257 S.E.2d at 590. For these reasons, we hold that the jury was correctly informed that it had a duty to recommnd a sentence of death if it made the three findings necessary to support such a sentence under G.S. 15A-2000(c).[17] (Emphases in original; footnotes omitted).

whether that court did not deem itself bound [to rule as it did] by its view of the demands of [this Court's] decisions . . .." Missouri ex rel. Southern R. Co. v. Mayfield, supra. Accordingly, an important federal question emerges. Moreover, "[t]he possibility that the state court might have reached the same conclusion if it had decided the question purely as a matter of state does not create an adequate and independent state ground that relieves this Court of the necessity of considering the federal question." United Air Lines v. Mahin, 410 U.S. 623, 630-31 (1973).

The federal question presented is a critical one for which state courts and legislatures "deserve the clearest guidance that the Court can provide." Lockett v. Ohio, 438 U.S. 586, 602 (1978). It is whether a state procedure which requires, for any capital jury verdict three separate findings regarding statutorily defined aggravating circumstances, but would leave to the jury finally "to dispense mercy on the basis of factors too intangible to write into a statute . . .," Gregg v. Georgia 428 U.S. 153, 222 (Opinion of White, J.), is "consistent and principled but also humane and sensible as to uniqueness of the individual," Eddings v. Oklahoma, ___ U.S. ___, ___, 102 S.Ct. 869, 874, 71 L.Ed.2d. 1, 8 (1982), or allows unbridled discretion condemned by Furman.

Petitioner had thought that it was clear that the extent of jury discretion which would remain if the North Carolina statute were construed as he contended the legislature intended would not be "capricious" in a constitutional sense under Furman, but instead would be "guided" as required by Gregg. That seemed to him to be the holding of Gregg. See, 428 U.S. at 199, 203 (prevailing Opinion); id. at 199 (Opinion of White, J. joined by the Chief Justice and

Rehnquist, J.). Whatever the holding of Gregg, the division of the court below demonstrates that "confusion," Lockett, 438 U.S. at 599, persists as to what satisfies both Eighth Amendment procedural commands "of measured consistent application and fairness to the accused." Eddings v. Oklahoma, ___ U.S. ___, at 102 S.Ct. at 847, 71 L.Ed.2d at 8 (1982).

If the majority below is correct, then this Court should so declare since, as pointed out by Justice Exum, statutes previously before this Court from other States would almost certainly be unconstitutional under Furman. 292 S.E.2d at 234-36. If, on the other hand, Justice Exum's conclusion that "the majority's interpretation is not constitutionally required," 292 S.E.2d at 230, then this Court "should so declare, leaving the State court free to decide the . . . issue solely as a matter of [North Carolina] law." Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, 568 (1977). See, also, Delaware v. Prouse, supra; United Air Lines v. Mahin, supra; Perkins v. Benguet Consol. Mining Co., supra; Missouri ex rel. Southern R. Co. v. Mayfield, supra; State Tax Commission v. Van Cott, supra; Red Cross v. Atlantic Fruit Co., supra.

If the decision below remains uncorrected, capital defendants will face trial in North Carolina under a considerably more mandatory statute than the General Assembly may have intended. Moreover, the decision below stands as a bar to any revision of the statute to permit a greater measure of jury discretion as long as the General Assembly desires to maintain a constitutional statute. See, Woodson, 428 U.S. at 300. Accordingly, this Court should grant certiorari in order to "remand the case to avoid the risk of 'an affirmance of a decision which might have been decided differently if the court below had felt free, under [this

Court's] decisions, to do so.' Perkins v. Benguet Consol. Mining Co., 342 U.S. at 443." United Air Lines v. Mahin, 410 U.S. at 632.